Supreme Court, U.S.
FILED

No. 98-____ 98 465 SEP 17 1998

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DARRELL DARDEN, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Twenty-Second Judicial District Court for the Parish of Washington, State of Louisiana

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PETITION FOR A WRIT OF CERTIORARI

JOHN G. ROBERTS, JR.*
GREGORY G. GARRE
CATHERINE E. STETSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5810

F. FRANK FONTENOT
JAMES K. IRVIN
TIMOTHY T. RONIGER
MILLING BENSON WOODWARD L.L.P.
909 Poydras Street
Suite 2300
New Orleans, LA 70112
(504) 569-7000

* Counsel of Record

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

50 pp

QUESTION PRESENTED

Whether the Louisiana state court correctly held—in conflict with this Court's decision in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), and the clear intent of Congress—that the tort claims of plaintiffs below were not pre-empted by the Federal Railroad Safety Act and applicable regulations issued under the Hazardous Materials Transportation Act.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Kansas City Southern Railway Company ("KCS") was applicant before the Louisiana Supreme Court, applicant before the Louisiana Court of Appeal, and defendant before the Louisiana District Court. Pursuant to S. Ct. Rule 29.6, KCS notes that its parent is Kansas City Southern Industries, Inc. Affiliated companies of Kansas City Southern Industries, Inc., are Gateway Western Railway Company, Gateway Eastern Railway Company, Berger Associates, Inc., Janus Capital Corporation, Southern Group, Inc., Southern Capital Corporation, L.L.C., Southern Industrial Services, Pabtex, Inc., Superior Tie & Timber, Trans-Serve, Inc., The Texas Mexican Railway Company, and Transportacion Ferroviaria Mexicana.

Respondents purport to represent a class of plaintiffs numbering in the thousands. Named respondent Darrell Darden is one of twenty-three named plaintiffs and putative class representatives. The other named plaintiffs are Jennifer George, Gary George, Mary Anna Hartzog, Edward Johnson, Kim Shrieve, George Sorenson, Douglas Watkins, John Watts, William Reed Holloway, John Sumurall, Leon Thomas, the Estate of Al Garic, Kimberly Seal, Bradley Seal, Magic City Recording, Inc., Parker's Flower Company, Inc., Joe Dunaway, Alberta King, Tyrone Freeman, Janene Dunaway, Kara Smith, and Elizabeth Porter Ratcliff.

Union Tank Car Company, Illinois Central Railroad Company, Gaylord Chemical Corporation, Gaylord Container Corporation, Vicksburg Chemical Company, Arie Genger, Cedar Chemical Corporation, Nine West Corporation, Trans-Resources, Inc., TPR Investment Associates, Inc., Aetna Casualty Company, Agricultural Insurance Company, American National Fire Insurance Company, Federal Insurance Company, RLI Insurance Company, Reliance National Insurance Company, Royal Indemnity

Company, Transportation Insurance Company, United National Insurance Company, Westchester Fire Insurance Company, American Excess Insurance Association, CAPCO Insurance Ltd., National Union Fire Insurance Company of Pittsburgh, CIGNA Insurance Company, Steadfast Insurance Company, Reliance Insurance Company, and Illinois National Insurance Company are also respondents pursuant to S. Ct. Rule 12.6.

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KANSAS CITY SOUTHERN RAILWAY COMPANY,
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Petition for a Writ of Certiorari to the Twenty-Second Judicial District Court for the Parish of Washington, State of Louisiana

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PETITION FOR A WRIT OF CERTIORARI

The Kansas City Southern Railway Company ("KCS") respectfully petitions for a writ of certiorari to review the judgment of the Twenty-Second Judicial District Court, Parish of Washington, Louisiana, in this case.

OPINIONS BELOW

The decision of the Louisiana Supreme Court denying KCS's application for a Supervisory Writ of Review from the decision of the Louisiana Court of Appeal, First Circuit is unreported and reprinted in the appendix hereto ("App.") at 1a. The judgment of the Louisiana Court of Appeal denying KCS's application for a Supervisory Writ of Review from the Twenty-Second Judicial District Court, Washington Parish, is unreported and reprinted at

App. 2a. The decision of the Twenty-Second Judicial District Court, Washington Parish, is unreported and reprinted at App. 3a.[1]

JURISDICTION

The order of the Louisiana Supreme Court denying review was entered on June 19, 1998. App. 1a.[2] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Federal Railroad Safety Act, 49 U.S.C. § 20101 *et seq.*, and of the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 *et seq.*, are reprinted at App. 5a-17a.

INTRODUCTION

Article VI of the Constitution declares that the laws of the United States are the "supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. State law found to conflict with federal law is "without effect." *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981); *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819).

The "ultimate touchstone" of this Court's pre-emption analysis is congressional intent. *Retail Clerks Int'l Ass'n*,

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[1] The Louisiana Court of Appeal and the Louisiana Supreme Court denied KCS's applications for supervisory writs of review. The decision of the trial court thus is the judgment of the highest court in which decision could be had. *See Virginian Ry.* v. *Mullens*, 271 U.S. 220, 222 (1926).

[2] The time for filing a petition for writ of certiorari runs from the date of the highest state court's refusal to review the decision of the lower court. *American Ry. Express Co.* v. *Levee*, 263 U.S. 19, 20-21 (1923).

Local 1625 v. *Schermerhorn*, 375 U.S. 96, 103 (1963). The intent of Congress to pre-empt state law may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). When the statute in question contains an express pre-emption clause, this Court must "in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993).

The Federal Railroad Safety Act ("FRSA") contains such a pre-emption clause. State railroad safety standards—including those established by common law duties—may remain in effect only until the Secretary of Transportation has promulgated regulations covering the subject matter of the state standards. 49 U.S.C. § 20106. Pursuant to his authority under the FRSA, and pursuant to Congress's express desire for *national* regulation of railroad safety, the Secretary of Transportation has promulgated comprehensive federal railroad safety regulations—including comprehensive regulations covering the subject matter of rail transportation of hazardous materials, inspection and repair of tank cars, training and certification of tank car inspectors and hazardous-materials employees, and response procedures for emergency situations involving hazardous materials transported by rail.

KCS is a defendant in a massive Louisiana state court class action and roughly 4,000 individual state court actions in Mississippi, brought on by the rupture of a railroad tank car and the resulting release of dinitrogen tetroxide, a hazardous chemical. Plaintiffs in these state court lawsuits invoked widely divergent punitive damages statutes. *See* La. Civ. Code art. 2315.3 (repealed but applicable to the conduct at issue); Miss. Civ. Prac. & Proc. § 11-1-65. Plaintiffs' claims against KCS—a railroad with only the most tangential connection to the

chemical release—involve questions regulated by the federal government to the last detail. These claims are therefore pre-empted by the FRSA. The trial courts below, however, refused to dismiss respondents' state law claims, and neither the Louisiana nor the Mississippi appellate courts remedied the trial courts' clear error. This Court should intervene. Allowing two sets of state court actions against KCS to go forward on the basis of state claims pre-empted by the FRSA flouts this Court's decision in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), defies the clear language of the FRSA, and thwarts the Supremacy Clause.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The railroad industry has been subject to comprehensive federal regulation for over a hundred years. Beginning with the Safety Appliance Act of 1893, 49 U.S.C. § 20301 *et seq.*, and up to the present, Congress has undertaken to regulate "almost all aspects of the railroad industry, including rates, safety, labor relations, and worker conditions." *R.J. Corman R.R.* v. *Palmore*, 999 F.2d 149, 151-152 (6th Cir. 1993). The industry's long history of "pervasive and uniquely-tailored congressional action indicates Congress's general intent that railroads should be regulated primarily on a national level through an integrated network of federal law." *Id.* Federal regulation ensures uniformity of rules and regulations for railroads, which frequently operate across state lines, and have for more than a century been vital to the flow of interstate commerce in this country. *See generally* William H. Rehnquist, *The Supreme Court* 167-170, 175-185 (1987) (discussing the rise and regulation of railroads).

One of the many areas covered by federal law is railroad safety. In 1970, Congress enacted the Federal Railroad Safety Act ("FRSA") with an express purpose: to

"promote safety in *every area* of railroad operations." 49 U.S.C. § 20101 (emphasis added).[3] The FRSA requires the Secretary of Transportation to "prescribe regulations and issue orders for *every area* of railroad safety," *id.* § 20103(a) (emphasis added), and requires the Secretary to "consider existing relevant safety information and standards" in prescribing regulations and issuing orders under the Act. *Id.* § 20103(c). States may participate in "investigative and surveillance activities" to enforce federal safety regulations, if certified by the federal government. *Id.* § 20105; *see also* 49 C.F.R. § 212.1 *et seq.* (state safety participation regulations); *Missouri Pac. R.R.* v. *Railroad Comm'n of Tex.*, 833 F.2d 570, 578 (5th Cir. 1987) (FRSA "recognized and explicitly preserved the state's participation *in enforcement of the federal scheme*") (emphasis added).

While states are allotted a role in enforcing federal standards, the FRSA makes clear that "[l]aws, regulations and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106; *see also Rayner* v. *Smirl*, 873 F.2d 60, 65 (4th Cir.), *cert. denied*, 493 U.S. 876 (1989); *Donelon* v. *New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir. 1973) ("The ultimate goal of the Act is to establish nationally uniform control of railroad safety"), *cert. denied*, 414 U.S. 855 (1973). The legislative history of the FRSA also confirms Congress's intent to exert primary—indeed, nearly exclusive—authority over railroad safety. Congress recognized that the national railroad system was a unique entity, demanding a level of federal regulatory involvement not typical of other industries. Because "the vast bulk of railroad mileage, and operations thereover, are by companies whose operations extend over many State

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[3] Originally codified at 45 U.S.C. § 421 *et seq.*, the FRSA was recodified in 1994, when Congress recodified all "laws related to transportation in one comprehensive title." H.R. Rep. No. 103-180, at 3 (1993).

lines," H.R. Rep. No. 91-1194, at 13 (1970), Congress concluded that the safety of the Nation's railroad system would not be advanced by "subjecting the national rail system to a variety of enforcement *in 50 different judicial* and administrative systems." *Id.* at 11. Rather, the best and most efficient way to ensure the safety of the national railroad system was to "make all [safety] enforcement Federal in nature." *Id.*

Pursuant to his authority under the FRSA, the Secretary has promulgated detailed regulations governing railroad safety enforcement procedures, including inspection procedures, *see* 49 C.F.R. § 209.1 *et seq.*; railroad operating practices, *see id.* § 218.1 *et seq.*; safety standards for railroad locomotives, *see id.* § 229.1 *et seq.*; safety standards for grade crossings, *see id.* § 234.1 *et seq.*; and standards for the qualification and certification of engineers, *see id.* § 240.1 *et seq.* A railroad violating FRSA regulations is subject to civil penalties, *see* 49 U.S.C. § 20111, and the Attorney General has authority under the Act to initiate a civil action to enjoin a violation of safety regulations. *Id.* § 20112. States may bring actions to enjoin the violation of a railroad safety regulation or for civil penalties, if the Secretary of Transportation fails to bring an action within a specified period of time. *Id.* § 20113.[4]

Railroad transportation of hazardous materials in particular is governed by a second statute as well, the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. § 5101 *et seq.* Enacted in 1975, the HMTA establishes an "elaborate scheme for the designation, handling, packaging, labeling, and shipping of hazardous materials." *New Hampshire Motor Transp. Ass'n* v. *Town of Plaistow*, 67 F.3d 326, 331 (1st Cir. 1995), *cert. denied*, 517 U.S. 1120 (1996); *see also Southern Pac.*

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[4] States may not bring enforcement actions where the Secretary has certified that no violation of federal standards occurred. 49 U.S.C. § 20113(a).

Transp. Co. v. *Public Serv. Comm'n of Nev.*, 909 F.2d 352, 358 (9th Cir. 1990) (HMTA designed to implement "uniform, national scheme of regulation"). Enacted to "improv[e] the regulatory and enforcement authority of the Secretary of Transportation" over the transportation of hazardous material, 49 U.S.C. § 5101, the HMTA requires the Secretary to prescribe "regulations for the safe transportation of hazardous material in intrastate, interstate, and foreign commerce," *id.* § 5103(b)(1), and provides that the regulations shall govern "safety aspects of the transportation of hazardous material the Secretary considers appropriate." *Id.* § 5103(b)(1)(B).

Pursuant to this mandate, the Secretary has promulgated comprehensive regulations under the HMTA. *See* 49 C.F.R. §§ 171-179;[5] *see also Chlorine Inst., Inc.* v.

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[5] The regulations address, among other things:

- Pre-departure, interchange, and in-transit inspection of tank cars, *see* 49 C.F.R. Part 174;
- Manufacturing specifications for various types of tank cars, *see id.* Part 179;
- Equipment specifications for tank cars, *see id.*;
- Periodic testing of tank cars, *see id.* § 173.31(c);
- Repair and maintenance of tank cars, *see id.* Part 179 and Appendix R of the Association of American Railroads Specifications for Tank Cars;
- Marking and placarding of tank cars for identification of contents, *see id.* Parts 172, 174;
- Maximum pressure and weight limitations for compressed gases in tank cars, *see id.* §§ 173.314(c), 179.13;
- Identification and classification of hazardous materials, *see id.* Part 172;
- Documentation to accompany the transportation of hazardous materials, *see id.*;
- Hazardous materials transportation procedures, including loading and securing closures of tank cars, *see id.* Part 173;
- Handling of leaking tank cars, *see id* and *id.* Part 174;
- Allocation of duties among shippers, originating carriers and interchange carriers, *see id.* Part 173;

California Highway Patrol, 29 F.3d 495, 497 (9th Cir. 1994) (HMTA regulations "impose extensive requirements" for shipment of hazardous chemicals). As with the FRSA, the HMTA has numerous enforcement provisions, allowing the Attorney General to bring civil actions to enforce that Act or its regulations and to seek "appropriate relief, including punitive damages" against a violator. 49 U.S.C. § 5122(a). The HMTA provides for civil penalties of up to $25,000 for a violation of the Act or its regulations, *id.* § 5123, and for criminal fines or imprisonment for up to five years for a willful violation of the Act or its regulations. *Id.* § 5124.

The FRSA contains an express pre-emption clause, displacing state law in all but certain narrow circumstances. By its plain terms, the FRSA allows state laws, rules, regulations, orders, or standards relating to railroad safety to remain in place only "until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.* § 20106.[6] "Legal duties imposed on railroads by the com-

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- Operating rules governing hazardous-materials employee conduct and tests and inspections to ensure compliance with those rules, *see id.* Part 172;
- Education and training of hazardous-materials employees, *see id.*;
- Hazardous material release emergency notification procedures and maintenance of information necessary for response to hazardous materials incidents, *see id.* Part 171; and
- Public sector emergency response procedures, education, and training for response to hazardous materials incidents, *see id.* and *id.* Part 110.

Notably, the Louisiana punitive damages statute limited its application to the storage, transportation, and handling of hazardous materials—areas comprehensively covered by the foregoing regulations.

[6] Under the FRSA's savings clause, an "additional or more stringent" state law may remain in effect when it (1) is necessary to

mon law," including through negligence claims, are equally susceptible to FRSA pre-emption. *Easterwood*, 507 U.S. at 664. The FRSA's pre-emption clause applies to "*any* regulation 'adopted' by the Secretary * * * regardless of the enabling legislation." *Id.* at 663 (emphasis added). Accordingly, regulations promulgated by the Secretary under the HMTA must be considered in a FRSA pre-emption analysis, where railroad transportation of hazardous materials is at issue. *See CSX Transp., Inc.* v. *Public Utils. Comm'n of Ohio*, 901 F.2d 497, 501 (6th Cir. 1990) (considering HMTA regulations in context of FRSA pre-emption analysis), *cert. denied*, 498 U.S. 1066 (1991); *In re Miamisburg Train Derailment Litigation*, 626 N.E.2d 85 (Ohio) (same), *cert. denied*, 513 U.S. 809 (1994).[7]

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eliminate or reduce an "essentially local safety hazard;" (2) is not incompatible with a federal law, regulation, or order; and (3) does not unreasonably burden interstate commerce. *Id.* Common law negligence claims do not fall within this savings clause. *Easterwood*, 507 U.S. at 675 ("The common law of negligence provides a general rule to address all hazards caused by a lack of due care, not just those owing to unique local conditions.")

[7] The HMTA's own pre-emption provision provides that a state requirement is pre-empted if (1) complying with the state requirement is "not possible," or if (2) the state requirement poses an "obstacle" to the purposes of the HTMA. 49 U.S.C. § 5125(a). In addition, a state law "not substantively the same" as the federal statutes or regulations is pre-empted if it addresses (1) the "designation, description, and classification of hazardous material;" (2) "packing, repacking, handling, labeling, marking, and placarding of hazardous material;" (3) "preparation, execution, and use of shipping documents related to hazardous materials and requirements related to the number, contents and placement of those documents;" (4) "written notification, recording, and reporting of the unintentional release in transportation of hazardous material;" or (5) the "design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marketed, certified, or sold as qualified for use in transporting hazardous material." *Id.* § 5125(b). Even when considered only under the HMTA's pre-emption provision, putting the FRSA to one

B. Factual Background

The Kansas City Southern Railway Company ("KCS") operates a commercial rail carrier system extending over nearly 2,000 miles of track from Chicago to Veracruz, Mexico and traversing ten states. In October 1995, KCS transported a railroad tank car carrying dinitrogen tetroxide from Vicksburg, Mississippi, east to Jackson, Mississippi, a distance of about forty miles. In Jackson, the railroad car was turned over to the Illinois Central Railroad, which transported the car a hundred miles south to the Gaylord Chemical Corporation in Bogalusa, Louisiana, a town near the Mississippi state line. Two weeks after KCS released the tank car to Illinois Central, the tank ruptured at the Gaylord plant, releasing dinitrogen tetroxide into the air.

Within hours of the chemical release, thousands of plaintiffs in Louisiana had filed class action lawsuits against two dozen defendants. KCS—which had transported the railroad car for forty miles, some two weeks and a hundred miles distant from the accident—was named as a defendant, along with the manufacturer of the dinitrogen tetroxide, the manufacturer of the tank car, the Illinois Central Railroad, and the Gaylord Chemical Corporation, among others. Because of a dispute among plaintiffs' counsel, a dissident group filed individual suits on behalf of thousands of plaintiffs in Mississippi state court, based on the same facts against many of the same defendants. The Louisiana actions were consolidated into a single class action,[8] while in Mississippi—which has no

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side, the state standards in this case are clearly pre-empted under section 5125(a), for the reasons stated in n.15 *infra*. The provisions of section 5125(b) also specifically encompass many of plaintiffs' common law claims, and pre-empt any state standards—including standards arising from common law duties—which are "not substantively the same" as those imposed by the federal regulatory scheme.

[8] The Louisiana consolidated complaint bears the caption "*In re Chemical Release at Bogalusa.*" The named respondent in this peti-

class action procedure—over 4,000 individual actions were consolidated for pre-trial purposes only.[9]

Plaintiffs asserted thirteen claims against KCS in their consolidated Louisiana complaint. They alleged that KCS was negligent in transporting, maintaining, inspecting, and repairing the railroad tank car, had negligently trained or hired inexperienced hazardous materials employees, and had failed to implement emergency notification procedures to address the possibility of a chemical release. Each of these claims is directed to conduct or procedures that are extensively addressed by the federal regulations adopted under the FRSA and the HMTA. *See supra* at 4-9.

KCS moved for judgment on the pleadings in the Louisiana action. Explaining that the comprehensive network of FRSA and HMTA safety regulations completely "cover[ed] the subject matter" of each of plaintiffs' claims, 49 U.S.C. § 20106, KCS argued that the claims were pre-empted under the FRSA. The Louisiana trial court rejected KCS's FRSA pre-emption claim and denied KCS's motion for judgment on the pleadings, purporting to rely on this Court's opinion in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993). KCS petitioned the Louisiana Court of Appeal, First District, and later the Louisiana Supreme Court for review of the trial court's ruling. Both courts denied review without comment. App. 1a, 2a.[10]

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tion for certiorari, Darrell Darden, is the first named plaintiff and proposed class representative listed in plaintiffs' second amended consolidated complaint.

[9] On June 22, 1998, the Mississippi Supreme Court denied KCS's application seeking review of the decision of the trial court in the Mississippi actions that plaintiffs' claims in those actions were not pre-empted by the FRSA and regulations issued under the HMTA. KCS is filing a petition for certiorari with this Court seeking review of that decision. That petition and this one raise the same questions and should be considered together.

[10] The decision of the state trial court is subject to review by this Court under the fourth prong of *Cox Broadcasting Corp.* v.

REASONS FOR GRANTING THE WRIT

I. THE LOUISIANA COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *EASTERWOOD*.

A principal consideration governing the exercise of this Court's certiorari jurisdiction is whether a state court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c). The Louisiana trial court's refusal to dismiss plaintiffs' massive tort action against KCS on pre-emption grounds directly conflicts with this Court's decision in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993).

1. *Easterwood* arose from a wrongful-death suit against CSX, brought by the widow of a man killed when a CSX train collided with his truck at a Georgia railroad crossing. The plaintiff argued that CSX was negligent under Georgia law for failing to maintain adequate warning devices at the crossing and for operating the train at an excessive speed. CSX contended that the FRSA pre-empted both claims. After reviewing the Act's pre-emption provision, this Court posed the pertinent question as being whether the Secretary of Transportation had issued regulations which "substantially subsume[d]" Georgia negligence law pertaining to the "maintenance of, and the

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Cohn, 420 U.S. 469, 482-483 (1975), because "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." Refusal to hear KCS's federal pre-emption claim at this time would also "seriously erode" the federal policy underlying that claim, by subjecting KCS to the burden of a massive state class action trial. *Id.* at 483; *see also Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 178-180 (1988) (reversal of holding that statute not pre-empted by federal law would preclude further proceedings, and failure to review "might seriously erode federal policy"); *Local No. 438 Constr. & Gen. Laborers' Union* v. *Curry*, 371 U.S. 542, 550 (1963) (postponing review of pre-emption claim would "seriously erode" national labor policy).

operation of trains at, grade crossings." *Easterwood*, 507 U.S. at 664.[11]

CSX argued that three separate sets of federal regulations pre-empted Easterwood's inadequate warning device claim. The first, 23 C.F.R. Part 924, required states receiving federal aid to implement "highway safety improvement programs." Designed to set forth "policy for the development and implementation of a comprehensive highway safety improvement program in each State," *id.* § 924.1, the regulations directed the states to consider, among other things, dangers posed by grade crossings. *Id.* § 924.9(a)(4). The Court rejected CSX's argument that the Part 924 regulations pre-empted Easterwood's negligence claim. The regulations did not "cover the subject matter" of maintenance of grade crossings, as required to find pre-emption of Easterwood's negligence claim; they merely "establish[ed] the general terms of the bargain between the Federal and State Governments"—states could obtain federal aid if they complied with certain policy guidelines. The Court therefore declined to find pre-emption based "solely on the strength of the general mandates" of Part 924. 507 U.S. at 667-668.

CSX next argued that the language in the Federal Highway Administration's Manual on Uniform Traffic Control Devices for Streets and Highways ("Manual"), 23 C.F.R. §§ 655.601-.603, pre-empted Easterwood's warning device claim. The Court again disagreed. Noting that the Manual itself expressly disavowed any intent to create "'legal requirement[s]'" for the installation of any particular traffic control devices, 507 U.S. at 669 (quoting Manual at 1A-4), the Court refused to displace state neg-

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[11] Because the FRSA's pre-emption clause requires that the federal regulations "cover" the subject matter of the state law in question, rather than merely "touch upon" or "relate to" the subject matter of that law, the Court concluded that "pre-emption will lie only if the federal regulations *substantially subsume* the subject matter of the relevant state law." 507 U.S. at 664 (emphasis added).

ligence law "by means of an elliptical reference in a Government Manual." *Id.*

The Court viewed the third regulation differently. Promulgated by the Secretary of Transportation pursuant to the Highway Safety Act of 1973, 23 C.F.R. § 646.214 requires that a grade-crossing improvement project include an automatic gate with a flashing light signal (if certain conditions are present at the crossing) *or* receive federal approval, if federal funds "participate in the installation" of the warning devices. *Id.* § 646.214(b)(3), (b)(4). Unlike 23 C.F.R. Part 924 and the Manual, Section 646.214(b) establishes particular federal requirements for warning devices at grade crossings. Where applicable—that is, where federal funds had been used to make improvements at a grade crossing—the regulations therefore "cover[ed] the subject matter" of any state law imposing an independent duty on a railroad to use a particular warning device at the crossing. *Easterwood*, 507 U.S. at 671.

While the *Easterwood* Court found that 23 C.F.R. § 646.214(b)(3) and (b)(4) pre-empted claims of inadequate warning devices at federally-funded grade crossings, no federal funds were used to maintain the crossing involved in the *Easterwood* collision, and so the pre-emptive regulations were inapplicable on the facts of that case. Easterwood's negligence claim for inadequate warning devices was thus allowed to proceed. 507 U.S. at 673. Easterwood's second negligence claim, however—that the train was traveling at an excessive speed when it reached the crossing—was found to be pre-empted. A federal regulation established maximum operating speeds —variable depending on the class of track—for all freight and passenger trains. *Id.* (citing 49 C.F.R. §§ 213.9(a) (1992)). Because related safety regulations indicated that the maximum train speeds were set with safety and grade crossing concerns in mind, the maximum-speed regulation covered the subject matter of "train speed with respect to track conditions, including the conditions posed

by grade crossings," and thus pre-empted any state law negligence claim based on excessive speed. *Id.* at 675.[12]

2. Thus, under *Easterwood*, if regulations promulgated by the Secretary of Transportation "substantially subsume" the subject matter of Louisiana negligence law regarding railroad cars transporting hazardous materials, plaintiffs' claims are pre-empted under the FRSA. *Easterwood*, 507 U.S. at 664. FRSA and HMTA regulations cover the subject matter of every single one of plaintiffs' specific claims against KCS.[13]

The breadth and detail of the applicable FRSA and HMTA regulations are evident upon examination of just one of plaintiffs' claims. Plaintiffs alleged that KCS negligently failed to "discover or repair damages or defects in the tank car used to store or transport hazardous substances." Second Consolidated Am. Master Pet. ¶ 40(b).

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[12] Following *Easterwood*, numerous lower courts have held that the FRSA pre-empted various state law claims. *See Ingram* v. *CSX Transp., Inc.*, 136 F.3d 858, 865 (11th Cir. 1998) (where federal funds are used in grade crossing improvement, inadequate signalization claim pre-empted); *Elrod* v. *Burlington N. R.R.*, 68 F.3d 241 (8th Cir. 1995) (state law negligence claim based on failure to provide adequate warning devices at crossing pre-empted); *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995) (state law negligence claims based on inadequate signalization at crossing pre-empted), *cert. denied*, 516 U.S. 1093 (1996); *Cox* v. *Norfolk & W. R.R.*, 998 F. Supp. 679 (S.D. W.Va. 1998) (negligence claim for excessive train speed pre-empted by FRSA); *Williams* v. *Burlington N. R.R.*, 849 F. Supp. 682 (E.D. Ark. 1994) (same). *Compare Southern Pac. Transp. Co.* v. *Public Util. Comm'n of Or.*, 9 F.3d 807, 813 (9th Cir. 1993) (state statute restricting sounding of locomotive whistles at certain times and crossings not pre-empted by FRSA; federal regulations required that locomotive whistles be of a certain decibel level, but did not address subject matter of restrictions on their use).

[13] The thirteenth claim in plaintiffs' consolidated complaint is a "catch-all," claiming damages from "[a]ny and all other acts of negligent fault which may be proven" at trial. Second Consolidated Am. Master Pet. ¶ 40(m). Such a vague claim is not susceptible to pre-emption analysis, nor can it survive if the twelve specific claims are pre-empted.

49 C.F.R. Part 215, promulgated by the Secretary under the FRSA, governs railroad freight car safety standards, including inspections. Section 215.11 requires a railroad to designate "persons qualified to inspect railroad freight cars for compliance." Section 215.13 requires the inspector to make a pre-departure inspection "[a]t each location where a freight car is placed in a train," according to the procedure prescribed in Appendix D of Section 215. The procedure in Appendix D requires, "as a minimum," that any freight car "be inspected for the imminently hazardous conditions listed below that are likely to cause an accident or casualty before the train arrives at its destination," including inspecting for any "[b]roken or missing safety appliance[s]," for "[l]ading leaking from a placarded hazardous material car," or for "[a]ny other apparent safety hazard likely to cause an accident or casualty before the train arrives at its destination." 49 C.F.R. § 215 App. D.

HMTA regulations impose additional detailed requirements on the qualification, use, and maintenance of tank cars used to ship hazardous materials.[14] A shipper of hazardous materials must determine "to the extent practicable, that the tank, safety appurtenances and fittings are in proper condition for the safe transportation of the lading," and adhere to detailed requirements for loading tanks. 49 C.F.R. § 173.31(b)(1) (1994).[15] Leaking tank cars "must not be offered for transportation until proper repairs have been made." *Id.* Closures of openings in tank cars must be secured "using a bar, wrench, or other suitable tool;" a wrench "having a handle at least 36 inches long must be used to apply the outlet valve cap." *Id.* § 173.31(b)(3). Tank cars of the type

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[14] HMTA regulations classify dinitrogen tetroxide as a Class 2.3 hazardous chemical. *See* 49 C.F.R. § 172.101.

[15] 49 C.F.R. § 173.31 was revised after the date of the October 1995 chemical release; the language quoted is from the regulation in effect as of that date. The revisions to the regulation do not affect the substantive issue on appeal.

used to transport dinitrogen tetroxide must be tested every 10 years, by "completely filling the tank and manway nozzle or expansion dome with water or other liquid of similar viscosity * * * and applying the specified pressure [for dinitrogen tetroxide, 500 p.s.i.] for 10 minutes if the tank is not insulated, or 20 minutes if the tank is insulated." *Id.* § 173.31(c)(2) and Retest Table 1.

49 C.F.R. Part 174, governing inspection of tank cars carrying hazardous materials, requires that each such tank car and each rail car adjacent to it must be inspected "[a]t any point where a train is required to be inspected;" cars may continue in transit "only when the inspection indicates that the cars are in a safe condition for transportation." 49 C.F.R. § 174.8. Each tank car "must be inspected by the carrier before acceptance at the originating point and when received in interchange." *Id.* § 174.9. A tank car "discovered in a leaking condition in transit may not be unnecessarily moved," *id.* § 174.50(a), must be protected against ignition of the liquid or vapor, *id.* § 174.50(b), and must be "stenciled on both sides in letters 7.5 cm (3 inches) in size, adjacent to the car number, 'LEAKY TANK. DO NOT LOAD UNTIL REPAIRED.'" *Id.* §174.50(d). Procedures for repairs or alterations to tank cars are fully set forth in an appendix to the regulations. *See id.* § 179.6.

The scores of regulations covering the subject matter of plaintiffs' "discover or repair" claim are representative of the regulations covering each of plaintiffs' eleven other claims. In their comprehensiveness and degree of detail, the regulations are directly analogous to the type of regulations held to pre-empt the plaintiff's state law negligence claim in *Easterwood*. Far from the "general mandates" or "elliptical reference[s]" found insufficient to pre-empt state law in *Easterwood*, *see* 507 U.S. at 668-669, the regulations in fact completely "displace state and private decisionmaking authority" by establishing federal requirements for the transport of hazardous materials, the repair,

maintenance, and inspection of tank cars, the hiring and training of hazardous materials employees, and the procedures for addressing emergency situations. *Id.* at 670. The regulations clearly "substantially subsume" the subject matter of each and every one of plaintiffs' claims against KCS. *Id.* at 664.

3. Because dozens of federal regulations "cover[ed] the subject matter" of each of plaintiffs' claims, the trial court should have dismissed the claims against KCS as pre-empted by the FRSA. It did not. Citing *Easterwood* for support, the court instead concluded: "[I]f there is anything in this [complaint] that is not subsumed by federal law, then state law is applicable and the motion should be denied. I find that there are those things." App. 4a.

The trial court did not address plaintiffs' claims individually, identify what "those things" were, or explain its ruling any further. Its ruling directly conflicts with *Easterwood*. To determine whether a complaint containing multiple claims is pre-empted under the FRSA, a court must examine each individual claim to determine whether federal regulations cover the subject matter of that claim. *Easterwood*, 507 U.S. at 665; *see also Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 523-524 (1992) (Court's pre-emption analysis addressed "each category of damages actions in turn"); *Easterwood* v. *CSX Transp., Inc.*, 933 F.2d 1548, 1553 (11th Cir. 1991) (task in FRSA pre-emption case is to "examine each claim and determine if any federal regulations have been promulgated which cover the conduct at issue"), *aff'd*, 507 U.S. 658 (1993). Plaintiffs' individual claims against KCS involve several different subject matters: the transportation of hazardous materials, inspection of tank cars, hiring and training of hazardous materials employees, and proper public-sector notification and emergency procedures. These are all distinct subject matters under the FRSA, and all should have been analyzed separately under *Easterwood*.

But the trial court did not examine *any* of plaintiffs' twelve specific claims in this case. It made only a blanket pronouncement—citing *Easterwood*, no less—that because the court had found unenumerated "things" present in plaintiffs' complaint not subsumed by the federal law, *all* of plaintiffs' claims survived KCS's pre-emption challenge. This was legal error. It contradicts *Easterwood*, greatly prejudiced KCS, and should be corrected before KCS is compelled to endure years of boundless, duplicative and competing litigations in state court.

The trial court's ruling conflicts with *Easterwood* on another ground as well. It appears that the court concluded plaintiffs' request for damages, a remedy not available under the FRSA,[16] precluded dismissal of their claims.

This reasoning directly flouts *Easterwood*. If a claim for damages allowed a plaintiff to avoid the FRSA's pre-emption provision, *no* action for damages would ever be pre-empted under the FRSA. *Easterwood* itself gives the lie to that conclusion. *See also Elrod*, 68 F.3d 241; *Hatfield* v. *Burlington N. R.R.*, 64 F.3d 559 (10th Cir. 1995). When federal regulations cover the subject matter of a common law tort action, the tort action *may not proceed*, even if—as in *Easterwood*—the plaintiffs' claim is for damages.

This is not the first time the Louisiana courts have misapplied *Easterwood* in this manner to foreclose a legitimate pre-emption defense. In *In re New Orleans Train Car Leakage Fire Litigation*, 671 So.2d 540, 546 (La. App.), *writ denied*, 675 So.2d 1120 (La.), *cert. denied*, 117 S. Ct. 512 (1996), the Louisiana Court of Appeal concluded that the FRSA did not pre-empt a claim for

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[16] *See Abate* v. *Southern Pac. Transp. Co.*, 928 F.2d 167, 170 (5th Cir. 1991) (no compensatory or punitive damages available under the FRSA); *see also Borough of Ridgefield* v. *New York Susquehanna & W. R.R.*, 810 F.2d 57, 60 (3d Cir. 1987) (no compensatory or punitive damages available under the HMTA).

punitive damages under La. Civ. Code art. 2315.3, because the state punitive damages statute had a "different purpose[]" than the FRSA's penalty provisions. This was clear legal error under *Easterwood*. While state tort law (and the damages available thereunder) may serve different or additional purposes than the federal enforcement scheme, the FRSA expressly instructs that the *subject matter* of plaintiffs' claims governs the FRSA pre-emption inquiry, *not* the purpose of the state tort law regime. 49 U.S.C. § 20106. The subject matter of the Louisiana punitive damages statute at issue here and in *New Orleans* was limited to the transportation, handling, and storage of hazardous materials—the very areas covered in detail by federal law.

The test for pre-emption under the FRSA is straightforward: if federal railroad safety regulations cover the subject matter of a state law, the state law is pre-empted, no matter what purpose that law purports to advance. *See Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963) (in implied pre-emption analysis, test is "whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives"); *Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. 88, 105 (1992) ("In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law.").

Confining the FRSA pre-emption inquiry to subject matter, not purpose, is sound practice: as other courts have noted, the *effect* of superimposing state tort liability on an extensive federal regulatory scheme is exactly the same as superimposing any other state-created statutory or regulatory standard, despite the sometimes divergent purposes of state tort law and a federal regulatory scheme. Compensation in tort is awarded when a defendant has been found liable in tort; that finding is necessarily based

upon the conclusion that the defendant has violated some state-created standard of care. *See San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) ("[State] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."); *Law* v. *General Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997) (liability in tort "induce[s] defendants to conform their conduct to a standard of care established by the state"); *Ouelette* v. *Union Tank Car Co.*, 902 F. Supp. 5, 10 (D. Mass. 1995) (tort actions, if allowed, would "generate precisely those inconsistencies in railroad safety standards that Congressional action was intended to avoid," because railroads would "inevitably be subjected to varying interpretations of the federal regulations in different states").

The two regimes cannot coexist in this case. States have a role in enforcing railroad safety, but that role is prescribed and delimited by the FRSA. The fact that state tort damages may provide compensation otherwise unavailable to plaintiffs under the federal scheme provides no justification for permitting states to supplement established federal standards with their own. "[E]ven state regulation designed to protect vital state interests must give way to paramount federal legislation." *De Canas* v. *Bica*, 424 U.S. 351, 357 (1976). The Louisiana trial court's refusal to dismiss plaintiffs' claims against KCS on pre-emption grounds was clear error under *Easterwood*.[17]

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[17] This Court has also suggested that circumstances exist where, despite the existence of an express pre-emption provision, a court may still perform implied pre-emption analysis to find a state law pre-empted. *Freightliner* v. *Myrick*, 514 U.S. 280, 288 (1995). But the Court has yet to clarify *when* a court may look beyond an express pre-emption provision to find implied pre-emption. This case presents an opportunity to resolve that question. Even if not expressly pre-empted by the FRSA, plaintiffs' claims are impliedly pre-empted. State requirements are impliedly pre-empted where they frustrate

II. THE QUESTION PRESENTED IS IMPORTANT AND SHOULD BE DECIDED BY THIS COURT.

The conflict between the decisions of the Louisiana courts below and this Court's decision in *Easterwood* provides a compelling basis for review, but the need for certiorari is heightened still further by the importance of the issue at hand. KCS transported a rail car for 40 miles, two weeks before and a hundred miles distant from the Bogalusa chemical release. Despite its obviously minimal role and removal in time from the Bogalusa accident, KCS finds itself a defendant in not only a massive class action lawsuit in Louisiana state court, but thousands of individual suits in Mississippi state court as well. Without this Court's intervention, KCS will be forced to expend millions of dollars to defend itself in endless—and duplicative—trials, against thousands of plaintiffs with claims KCS contends are clearly pre-empted by the FRSA.

KCS's plight illustrates exactly why Congress concluded that railroad safety standards were best enforced by the federal government. As things now stand, two separate

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Congress's objectives. *See, e.g., Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. at 98; *English* v. *General Elec. Co.*, 496 U.S. 72, 78-79 (1990). Allowing state tort actions against railroads for their alleged failure properly to transport hazardous materials by rail opens the industry up to 50 different state standards of care, and to liability based not on the judgment of the federal government as to what standards the railroad must meet, but instead on the individualized and disparate judgments of thousands of state-court juries. Federal regulation has pervaded the railroad industry for a hundred years; particularly under the FRSA, where Congress has *expressly* stated its intent that railroad safety be regulated on a national level, state tort claims raising safety issues regulated to the last detail by federal authorities pose a very real risk of undermining the entire federal regulatory scheme, and frustrate the "accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). This Court should grant certiorari to clarify in what circumstances a court may look beyond express pre-emption provisions and find implied pre-emption.

juries in two separate states will pass judgment on whether KCS complied with its duties under each state's disparate negligence and punitive damages standards. This is precisely the sort of situation Congress anticipated when it declined to "subject[] the national rail system to a variety of enforcement in 50 different judicial and administrative systems" and instead enacted the FRSA with its express preemption provision. H.R. Rep. No. 91-1194, at 11. The Louisiana and Mississippi litigations against KCS threaten substantially to undermine the uniform regulatory scheme Congress envisioned—and required—with the passage of the FRSA. This Court should grant certiorari to review the decisions below allowing these state court actions to proceed in the face of the compelling need for uniform federal regulation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN G. ROBERTS, JR.*
GREGORY G. GARRE
CATHERINE E. STETSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5810

F. FRANK FONTENOT
JAMES K. IRVIN
TIMOTHY T. RONIGER
MILLING BENSON WOODWARD L.L.P.
909 Poydras Street
Suite 2300
New Orleans, LA 70112
(504) 569-7000

* Counsel of Record

Counsel for Petitioner

APPENDICES

APPENDIX A

THE SUPREME COURT OF THE STATE OF LOUISIANA

No. 98-CC-1206

IN RE: CHEMICAL RELEASE AT BOGALUSA

IN RE: Kansas City Southern Railway;—Defendant(s); Applying for Supervisory and/or Remedial Writs; to the Court of Appeal, First Circuit, Number CW97-2589; Parish of Washington 22nd Judicial District Court Div. "C" Number 73,341

June 19, 1998

Denied.

JPV
PFC
WFM
CDK
BJJ
CDT
JTK

LEMMON, J. not on panel; recused.

Supreme Court of Louisiana
June 19, 1998

/s/ [Illegible]
Clerk of Court
For the Court

APPENDIX B

STATE OF LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT

No. 97 CW 2589

IN RE CHEMICAL RELEASE AT BOGALUSA

April 6, 1998

In re: The Kansas City Southern Railway Company, applying for a supervisory writ of review, 22nd Judicial District Court, Parish of Washington, No. 73,341 and All Cases, Division "C".

WRIT DENIED.

RC
BJC
MAL

COURT OF APPEAL, FIRST CIRCUIT

/s/ Karen West
KAREN WEST
Deputy Clerk of Court
For the Court

APPENDIX C

22ND JUDICIAL DISTRICT COURT FOR THE PARISH OF WASHINGTON DIVISION "C"

No. 73,341, All Cases

IN RE CHEMICAL RELEASE AT BOGALUSA

JUDGMENT ON MOTIONS

This case came before the Court on Tuesday, October 14, 1997, for the hearing of the Motions for Judgment on the Pleadings filed separately and independently by defendants, The Kansas City Southern Railway Company and Union Tank Car Company.

Upon considering the pleadings, memoranda, and the argument of counsel;

IT IS ORDERED, ADJUDGED AND DECREED that the Motions for Judgment on the Pleadings of The Kansas City Southern Railway Company and Union Tank Car Company be and are hereby DENIED.

Franklinton, Louisiana, this 31st day of October, 1997.

/s/ Patricia T. Hedges
District Judge

APPENDIX D

TWENTY-SECOND JUDICIAL DISTRICT COURT
PARISH OF WASHINGTON
STATE OF LOUISIANA

No. 73,341 "C" and all consolidated cases

IN RE: CHEMICAL RELEASE AT BOGALUSA

TRANSCRIPT OF PROCEEDINGS

Date: October 14, 1997

BEFORE: HON. PATRICIA T. HEDGES

* * * *

BY THE COURT:

Well, as far as the judgment on the pleadings is concerned, I have read your briefs prior to coming here today. I've enjoyed the argument. But basically you have just repeated or expanded on what you had in your briefs.

As I understand *Easterwood* and *Haydel*, and if there is anything in this amended master petition that is not subsumed by federal law, then state law is applicable and the motion should be denied. I find that there are those things; and, therefore, your motion for judgment on the pleadings is denied.

APPENDIX E

PERTINENT STATUTORY PROVISIONS

Federal Railroad Safety Act

49 U.S.C. § 20101 provides:

§ 20101. Purpose

The purpose of this chapter is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.

* * * *

49 U.S.C. § 20103 provides in pertinent part:

§ 20103. General authority

(a) REGULATIONS AND ORDERS.—The Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970.

(b) REGULATIONS OF PRACTICE FOR PROCEEDINGS.—The Secretary shall prescribe regulations of practice applicable to each proceeding under this chapter. The regulations shall reflect the varying nature of the proceedings and include time limits for disposition of the proceedings. The time limit for disposition of a proceeding may not be more than 12 months after the date it begins.

(c) CONSIDERATION OF INFORMATION AND STANDARDS.—In prescribing regulations and issuing orders under this section, the Secretary shall consider existing relevant safety information and standards.

* * * *

49 U.S.C. § 20105 provides in pertinent part:

§ 20105. State participation

(a) INVESTIGATIVE AND SURVEILLANCE ACTIVITIES.—The Secretary of Transportation may prescribe investigative and surveillance activities necessary to enforce the safety regulations prescribed and orders issued by the Secretary that apply to railroad equipment, facilities, rolling stock, and operations in a State. The State may participate in those activities when the safety practices for railroad equipment, facilities, rolling stock, and operations in the State are regulated by a State authority and the authority submits to the Secretary an annual certification as provided in subsection (b) of this section.

(b) ANNUAL CERTIFICATION.—(1) A State Authority's annual certification must include—

(A) a certification that the authority—

(i) has regulatory jurisdiction over the safety practices for railroad equipment, facilities, rolling stock, and operations in the State;

(ii) was given a copy of each safety regulation prescribed and order issued by the Secretary, that applies to the equipment, facilities, rolling stock, or operations, as of the date of certification; and

(iii) is conducting the investigative and surveillance activities prescribed by the Secretary under subsection (a) of this section; and

(B) a report, in the form the Secretary prescribes by regulation, that includes—

(i) the name and address of each railroad carrier subject to the safety jurisdiction of the authority;

(ii) each accident or incident reported during the prior 12 months by a railroad carrier involving a fatality, personal injury requiring hospitalization, or property damage of more than $750 (or a higher amount prescribed by the Secretary), and a summary of the authority's investigation of the cause and circumstances surrounding the accident or incident;

(iii) the record maintenance, reporting, and inspection practices conducted by the authority to aid the Secretary in enforcing railroad safety regulations prescribed and orders issued by the Secretary, including the number of inspections made of railroad equipment, facilities, rolling stock, and operations by the authority during the prior 12 months; and

(iv) other information the Secretary requires.

(2) An annual certification applies to a safety regulation prescribed or order issued after the date of the certification only if the State authority submits an appropriate certification to provide the necessary investigative and surveillance activities.

(3) If, after receipt of an annual certification, the Secretary decides the State authority is not complying satisfactorily with the investigative and surveillance activities prescribed under subsection (a) of this section, the Secretary may reject any part of the certification or take other appropriate action to achieve adequate enforcement. The Secretary must give the authority notice and an opportunity for a

hearing before taking action under this paragraph. When the Secretary gives notice, the burden of proof is on the authority to show that it is complying satisfactorily with the investigative and surveillance activities prescribed by the Secretary.

49 U.S.C. § 20106 provides:

§ 20106. National uniformity of regulation

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order—

(1) is necessary to eliminate or reduce an essentially local safety hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20111 provides in pertinent part:

§ 20111. Enforcement by the Secretary of Transportation

(a) EXCLUSIVE AUTHORITY.—The Secretary of Transportation has exclusive authority—

(1) to impose and compromise a civil penalty for a violation of a railroad safety regulation prescribed or order issued by the Secretary;

(2) except as provided in section 20113 of this title, to request an injunction for a violation of a railroad safety regulation prescribed or order issued by the Secretary; and

(3) to recommend appropriate action be taken under section 20112(a) of this title.

(b) COMPLIANCE ORDERS.—The Secretary may issue an order directing compliance with this part or with a railroad safety regulation prescribed or order issued under this part.

(c) ORDERS PROHIBITING INDIVIDUALS FROM PERFORMING SAFETY-SENSITIVE FUNCTIONS.—If an individual's violation of this chapter or any of the laws transferred to the jurisdiction of the Secretary of Transportation by subsection (e)(1), (2), and (6)(A) of section 6 of the Department of Transportation Act, as in effect on June 1, 1994, or a regulation prescribed or order issued by the Secretary under this chapter is shown to make that individual unfit for the performance of safety-sensitive functions, the Secretary, after notice and opportunity for a hearing, may issue an order prohibiting the individual from performing safety-sensitive functions in the railroad industry for a specified period of time or until specified conditions are met. This subsection does not affect the Secretary's authority under section 20104 of this title to act on an emergency basis.

(d) REGULATIONS REQUIRING REPORTING OF REMEDIAL ACTIONS.—(1) The Secretary shall prescribe regulations to require that a railroad carrier notified by the Secretary that imposition of a civil penalty will be recommended for a failure to comply with this part, chapter 51 or 57 of this title, or a regulation prescribed or order issued under any of those provisions, shall report to the Secretary, not later than the 30th day after the end of the month in which the notification is received—

(A) actions taken to remedy the failure; or

(B) if appropriate remedial actions cannot be taken by that 30th day, an explanation of the reasons for the delay.

49 U.S.C. § 20112 provides in pertinent part:

§ 20112. Enforcement by the Attorney General

(a) CIVIL ACTIONS.—At the request of the Secretary of Transportation, the Attorney General may bring a civil action in a district court of the United States—

(1) to enjoin a violation of, or to enforce, a railroad safety regulation prescribed or order issued by the Secretary;

(2) to collect a civil penalty imposed or an amount agreed on in compromise under section 21301 of this title; or

(3) to enforce a subpena issued by the Secretary under this chapter.

49 U.S.C. § 20113 provides in pertinent part:

§ 20113. Enforcement by the States

(a) INJUNCTIVE RELIEF.—If the Secretary of Transportation does not begin a civil action under section 20112 of this title to enjoin the violation of a railroad safety regulation prescribed or order issued by the Secretary not later than 15 days after the date the Secretary receives notice of the violation and a request from a State authority participating in investigative and surveillance activities under section 20105 of this title that the action be brought, the authority may bring a civil action in a district court of the United States to enjoin the violation. This subsection does not apply if the Secretary makes an affirmative

written finding that the violation did not occur or that the action is not necessary because of other enforcement action taken by the Secretary related to the violation.

(b) IMPOSITION AND COLLECTION OF CIVIL PENALTIES.—If the Secretary does not impose the applicable civil penalty for a violation of a railroad safety regulation prescribed or order issued by the Secretary not later than 60 days after the date of receiving notice from a State authority participating in investigative and surveillance activities under section 20105 of this title, the authority may bring a civil action in a district court of the United States to impose and collect the penalty. This paragraph does not apply if the Secretary makes an affirmative written finding that the violation did not occur.

Hazardous Materials Transportation Act

49 U.S.C. § 5101 provides:

§ 5101. Purpose

The purpose of this chapter is to provide adequate protection against the risks to life and property inherent in the transportation of hazardous material in commerce by improving the regulatory and enforcement authority of the Secretary of Transportation.

* * * *

49 U.S.C. § 5103 provides:

§ 5103. General regulatory authority

(a) DESIGNATING MATERIAL AS HAZARDOUS.—The Secretary of Transportation shall designate material (including an explosive, radioactive material, etiologic agent, flammable or combustible liquid or solid, poison, oxidizing or corrosive material, and compressed gas) or a group or class of material as hazardous when the Secretary decides that transporting the material in commerce in a particular amount and form may pose an unreasonable risk to health and safety or property.

(b) REGULATIONS FOR SAFE TRANSPORTATION.—(1) The Secretary shall prescribe regulations for the safe transportation of hazardous material in intrastate, interstate, and foreign commerce. The regulations—

(A) apply to a person—

(i) transporting hazardous material in commerce;

(ii) causing hazardous material to be transported in commerce; or

(iii) manufacturing, fabricating, marking, maintaining, reconditioning, repairing, or testing a packaging or a container that is represented, marked, certified, or sold by that person as qualified for use in transporting hazardous material in commerce; and

(B) shall govern safety aspects of the transportation of hazardous material the Secretary considers appropriate.

(2) A proceeding to prescribe the regulations must be conducted under section 553 of title 5, including an opportunity for informal oral presentation.

* * * *

49 U.S.C. § 5106 provides:

§ 5106. Handling criteria

The Secretary of Transportation may prescribe criteria for handling hazardous material, including—

(1) a minimum number of personnel;

(2) minimum levels of training and qualifications for personnel;

(3) the kind and frequency of inspections;

(4) equipment for detecting, warning of, and controlling risks posed by the hazardous material;

(5) specifications for the use of equipment and facilities used in handling and transporting the hazardous material; and

(6) a system of monitoring safety procedures for transporting the hazardous material.

* * * *

49 U.S.C. § 5122 provides:

§ 5122. Enforcement

(a) GENERAL.—At the request of the Secretary of Transportation, the Attorney General may bring a civil action in an appropriate district court of the United States to enforce this chapter or a regulation prescribed or order issued under this chapter. The court may award appropriate relief, including punitive damages.

(b) IMMINENT HAZARDS.—(1) If the Secretary has reason to believe that an imminent hazard exists, the Secretary may bring a civil action in an appropriate district court of the United States—

(A) to suspend or restrict the transportation of the hazardous material responsible for the hazard; or

(B) to eliminate or ameliorate the hazard.

(2) On request of the Secretary, the Attorney General shall bring an action under paragraph (1) of this subsection.

49 U.S.C. § 5123 provides:

§ 5123. Civil penalty

(a) PENALTY.—(1) A person that knowingly violates this chapter or a regulation prescribed or order issued under this chapter is liable to the United States Government for a civil penalty of at least $250 but not more than $25,000 for each violation. A person acts knowingly when—

(A) the person has actual knowledge of the facts giving rise to the violation; or

(B) a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge.

(2) A separate violation occurs for each day the violation, committed by a person that transports or causes to be transported hazardous material, continues.

(b) HEARING REQUIREMENT.—The Secretary of Transportation may find that a person has violated this chapter or a regulation prescribed under this chapter only after notice and an opportunity for a hearing. The Secretary shall impose a penalty under this section by giving the person written notice of the amount of the penalty.

(c) PENALTY CONSIDERATIONS.—In determining the amount of a civil penalty under this section, the Secretary shall consider—

(1) the nature, circumstances, extent, and gravity of the violation;

(2) with respect to the violator, the degree of culpability, any history of prior violations, the ability to pay, and any effect on the ability to continue to do business; and

(3) other matters that justice requires.

(d) CIVIL ACTIONS TO COLLECT.—The Attorney General may bring a civil action in an appropriate district court of the United States to collect a civil penalty under this section.

(e) COMPROMISE.—The Secretary may compromise the amount of a civil penalty imposed under this section before referral to the Attorney General.

(f) SETOFF.—The Government may deduct the amount of a civil penalty imposed or compromised under this section from amounts it owes the person liable for the penalty.

(g) DEPOSITING AMOUNTS COLLECTED.—Amounts collected under this section shall be deposited in the Treasury as miscellaneous receipts.

49 U.S.C. § 5124 provides:

§ 5124. Criminal penalty

A person knowingly violating section 5104(b) of this title or willfully violating this chapter or a regulation prescribed or order issued under this chapter shall be fined under title 18, imprisoned for not more than 5 years, or both.

49 U.S.C. § 5125 provides in pertinent part:

§ 5125. Preemption

(a) GENERAL.—Except as provided in subsections (b), (c), and (e) of this section and unless authorized by another law of the United States, a requirement of a State, political subdivision of a State, or Indian tribe is preempted if—

(1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter or a regulation prescribed under this chapter is not possible; or

(2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

(b) SUBSTANTIVE DIFFERENCES.—(1) Except as provided in subsection (c) of this section and unless authorized by another law of the United States, a law, regulation, order, or other requirement of a State, political subdivision of a State, or Indian tribe about any of the following subjects, that is not substantively the same as a provision of this chapter or a regulation prescribed under this chapter, is preempted:

(A) the designation, description, and classification of hazardous material.

(B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.

(D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.

(E) the design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

(2) If the Secretary of Transportation prescribes or has prescribed under section 5103(b), 5104, 5110, or 5112 of this title or prior comparable provision of law a regulation or standard related to a subject referred to in paragraph (1) of this subsection, a State, political subdivision of a State, or Indian tribe may prescribe, issue, maintain, and enforce only a law, regulation, standard, or order about the subject that is substantively the same as a provision of this chapter or a regulation prescribed or order issued under this chapter. The Secretary shall decide on and publish in the Federal Register the effective date of section 5103(b) of this title for any regulation or standard about any of those subjects that the Secretary prescribes after November 16, 1990. However, the effective date may not be earlier than 90 days after the Secretary prescribes the regulation or standard nor later than the last day of the 2-year period beginning on the date the Secretary prescribes the regulation or standard.

FILED
OCT 19 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-465

In The

Supreme Court of the United States

October Term, 1998

KANSAS CITY SOUTHERN RAILWAY COMPANY,

Petitioner,

vs.

DARRELL DARDEN, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Twenty-Second Judicial District Court for the Parish of Washington, State of Louisiana

RESPONDENTS' BRIEF IN OPPOSITION

GERALD E. MEUNIER*
GAINSBURGH, BENJAMIN, DAVID, MEUNIER & WARSHAUER
Plaintiffs' Liaison Committee, appearing for Respondents
2800 Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163
(504) 522-2304

**Counsel of Record* *(Continued)*

149194

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

REGINALD J. LAURENT
Plaintiffs' Liaison Committee, appearing for Respondents
3843 Coventry Street
Slidell, Louisiana 70458
(504) 847-1657

STEPHEN B. MURRAY
Plaintiffs' Liaison Committee, appearing for Respondents
Murray Law Firm
909 Poydras Street, Suite 2550
New Orleans, Louisiana 70112
(504) 525-8100

DANIEL E. BECNEL, JR.
BECNEL, LANDRY & BECNEL
Plaintiffs' Liaison Committee, appearing for Respondents
P. O. Drawer H
Reserve, Louisiana 70084
(504) 536-6445

PARTIES TO THE PROCEEDING

Respondents do not dispute the accuracy of petitioner's Rule 29.6 statement as to itself and as to other defendants in the proceeding below.

However, it is not correct, as petitioner represents, that the named respondent Darrell Darden "is one of twenty-three named plaintiffs and putative class representatives." In the judgment of the district court certifying this matter as a class action, only sixteen of the originally-named plaintiffs and class representatives were confirmed as representatives of the plaintiff class, and Mr. Darden is not one of them. A copy of the district court's certification judgment, dated November 10, 1997, is attached as Appendix A.

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APPENDIX

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STATEMENT OF THE CASE

This class action arises out of a massive chemical release which occurred on October 23, 1995 when a railroad tank car ruptured at the premises of Gaylord Chemical Corporation in Bogalusa, Louisiana. The tank car had been loaded in Vicksburg, Mississippi with 110,000 pounds of a poisonous and hazardous chemical (nitrogen tetroxide or N204), and after loading had a total weight approximately 9,500 pounds in excess of the maximum safe gross weight stenciled on the car and prescribed for this type of car under industry standards.

The overloaded and overweight railcar then was moved by petitioner Kansas City Southern (KCS) from Vicksburg to Jackson, Mississippi, where it was transferred in interchange by KCS to another railroad, Illinois Central Railroad, before being taken to the Gaylord Chemical plant in Bogalusa. While situated at the plant, the nature and amount of the car's contents caused its rupture and the resulting chemical release.

The claims on behalf of the plaintiff class include not only many instances of severe personal injury caused by exposure to the chemical cloud which engulfed the entire community of Bogalusa and its environs, but also claims for the disruption of business activity, evacuation, and the fear and fright of the citizens who lived through this catastrophe. In addition, claims are made for the recovery of punitive damages, as specifically authorized under the provisions of Louisiana law which govern this litigation.[1]

---

1. KCS asserts in its brief that plaintiffs have "invoked widely divergent punitive damages statutes." *See* p. 3, Petitioner's Brief. In fact, the petition at hand is one taken only from a ruling in the Louisiana class action case, which is governed solely by the tort law of the State of Louisiana. Therefore, the only basis asserted in this case for the recovery of punitive damages is that set forth in Article 2315.3 of the Louisiana Civil Code, which requires proof that a plaintiff's injuries have been caused by a defendant's "wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances."

In July 1996, the Plaintiffs' Liaison Committee (PLC) appointed by the trial judge to organize and manage this case on behalf of the purported plaintiff class, filed a consolidated Master Petition, naming KCS as one of the defendants responsible for the catastrophe. In June 1997, the PLC filed a second consolidated and amended Master Petition, which essentially alleged the same fault on the part of KCS as was alleged in the original petition. KCS answered both petitions, most recently the amended petition in July 1997, and denied all of the pertinent allegations of fault made by plaintiffs.

At the same time, in July 1997, KCS filed a "Motion for Judgment on the Pleadings," a motion recognized under the Louisiana Code of Civil Procedure as essentially the equivalent of common-law demurrer. KCS sought thereby a dismissal of the entire action against it on the basis of preemption. In considering such a motion, however, the Court is not permitted to review any evidence or facts beyond the pleadings, even though in this case substantial discovery pertinent to the specific fault of KCS had taken place in the roughly one-year period since the filing of the original petition.

Following briefs by the parties and oral argument, the district judge denied the KCS motion, and entered judgment to this effect on October 31, 1997. On April 6 1998, a unanimous panel of the First Circuit Court of Appeal denied the KCS application for a supervisory writ of review of this ruling by the district judge. The trial judge's ruling is not reviewable by appeal under Louisiana law, but only by such a supervisory writ. On June 19, 1998, the Louisiana Supreme Court, in a likewise unanimous decision, denied the KCS petition for a writ of supervisory review. The instant petition has followed.

OPPOSITION TO PETITIONER'S STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). Nothing in the language of that statutory provision, however, pertains to the situation at bar, or suffices to characterize the rulings appealed from below as reviewable by this Court on a petition for writ of certiorari. Moreover, Rule 10 of the Rules of this Court makes clear that review on a writ of certiorari is a matter of judicial discretion, not a matter of right, granted "only for compelling reasons." No such reasons exist for review in this case, consistent with the guiding language of Rule 10.

Petitioner suggests (in footnote 10 at pages 11-12 of its Brief) that this case fits the fourth category of matters subject to review under 28 U.S.C. § 1257, as set forth in this Court's decision in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). But that category contemplates a situation in which the refusal to review an interlocutory state court ruling would "seriously erode federal policy." 420 U.S. at 483. In contrast, this is a case in which the only state court rulings at issue are to the effect that KCS is not entitled to preemption based solely on the generally-pled allegations of the petition. As will be discussed more fully *infra*, the narrow procedural tactic adopted by KCS in raising the preemption issue, effectively has limited the scope of what can be considered and reviewed on appeal, so that this Court itself has been deprived of the type of record suitable for review under 28 U.S.C. § 1257 and/or Rule 10. It is specious to suggest that the disposition of so limited a procedural motion has done anything to "seriously erode" federal policy.

KCS suggests that the "principal consideration" in regard to this Court's exercise of certiorari jurisdiction is based on Rule 10(c), which contemplates that a court below "has decided an important federal question in a way that conflicts with relevant

decisions of this Court." In truth, what the trial court decided below was that KCS was not entitled to have the entirety of this action dismissed based purely on the allegations in the Master Petition. Nothing in what has transpired below can be shown to conflict with any decision of this Court. Rather, as discussed more fully *infra*, the lower court rulings in this case have been entirely consistent with this Court's holding in *CSX Transportation Company, Inc. v. Easterwood*, 507 U.S. 658 (1993).

Finally, the argument by KCS that the judges below, like other Louisiana courts, "have misapplied *Easterwood*" (p. 19 of Petitioner's Brief), is an argument which undercuts the basis for asserted jurisdiction in this Court. Rule 10 expressly provides that

> [a] petition for writ of certiorari is rarely granted when the asserted area consists of . . . the misapplication of a properly stated rule of law.

REASONS FOR DENYING THE WRIT

I.

KCS WAS NOT ENTITLED TO BRING A MOTION UNDER ARTICLE 965, AFTER DENYING — AND NECESSITATING EXTENSIVE DISCOVERY CONCERNING — THE VERY ALLEGATIONS OF FAULT IN THE PETITION WHICH NOW MUST BE DEEMED ADMITTED.

It is respondents' position that the KCS motion raising preemption is one which was improper under Louisiana procedural law, and should not have been allowed.

Historically, the procedural device contemplated in Article 965 of the Code of Civil Procedure extended to plaintiffs only, and was intended to allow a plaintiff to move for relief in his

favor on the petition, after the defendant failed to oppose or deny the pertinent allegations therein. Eventually, the Article was broadened to extend to defendants as well, because of the need for a procedural device in their favor when they brought incidental demands in a main action. *See Official Revision Comment*, Art. 965, La. Code of Civ. Pro. A motion for judgment on the pleadings brought under Article 965, therefore, is one as to which "all allegations of fact in the adverse party's pleadings shall be considered true." *See* Art. 965, La. Code of Civ. Pro.

Conversely, where the allegations against a party in pleading are *denied* by that party, Article 965 loses its intended purpose; and, in such situations, relief under Article 965 is unavailable. Louisiana courts have unanimously held to this effect, reasoning that the denial of allegations in the adverse party's pleadings necessarily precludes the filing or consideration of a motion for judgment on the pleadings under Article 965. *See, e.g., Abshire v. W. D. L. Investments, Inc.*, 428 So. 2d 1145 (La. App.), *writ den'd*, 433 So. 2d 161 (La. 1983); *First Metropolitan Bank v. Plaia*, 384 So. 2d 560 (La. App. 1980); *Thomas v. Allstate Ins. Co.*, 367 So. 2d 1300 (La. App. 1979); and *Alexander v. Bates*, 192 So. 2d 186 (La. App. 1966).

Thus, in a case where the plaintiff sought a judgment on the pleading after the defendant had denied the allegations of those pleadings, the Louisiana Supreme Court denied the motion, stating that:

> [i]t does not appear that defendant has clearly and specifically admitted any of the allegations of plaintiff's petition upon which he [plaintiff] would be entitled to a judgment, either in whole or in part, for his claim. The issues between the parties are complicated and we do not find that the district judge acted arbitrarily in dismissing the rule for judgment [on the pleadings] so as to permit the whole

> controversy to be heard and determined at one time by the jury.

Strange v. Carraway, 159 La. 61, 63, 105 So. 225 (1925). *Accord*, *Southport Mill v. Friedrichs*, 167 La. 101, 118 So. 818, 820 (1928).

The strained nature of the procedural approach by KCS, seeking relief under this wrongly-invoked Article of the Code, is made all the more clear in the specific context of this proceeding. As noted *supra*, a full year passed between the time KCS was first named as a defendant, and the time this Motion for Judgment on the Pleadings was brought. In that period, KCS not only denied the allegations of the petition, but participated with all other parties in extensive "merits" discovery pertaining to its alleged fault. This engagement in the development of factual issues and disputes is inimical to Article 965, which contemplates that fact issues are non-existent and that the court is presented with a single decision, *i.e.*, whether one or the other party is entitled to judgment on the pleadings as a matter of law, both parties having agreed to the truth of what is pled, and there being no facts or evidence in discovery needed to further specify the allegations at issue. The preemption argument of KCS, in contrast, virtually necessitates an understanding of the specific aspects and theories of its alleged fault under Louisiana law. It thus is improper for KCS to seek preemption under an Article which precludes consideration of what already has been revealed in discovery as to its fault under state law, beyond the generality of the initial pleadings.

Since petitioner's method for raising the issue of preemption is procedurally flawed, and flawed in a way which precludes intelligent focus on the specific, discovery-supported claims of state law liability as to this railroad, this Court is not presented with a legitimate ground for certiorari jurisdiction. The only approach made possible by virtue of the motion brought by KCS, is one in which all specifications of KCS fault reasonably inferable

from the general subject matter of the allegations first must be conjured, and then reviewed in the light of federal regulations which may or may not be germane, depending on facts not known to the Court. KCS cannot plausibly limit the Court's scope of knowledge as to the underlying specifications of fault, and then seek to take advantage of this limited knowledge by matching the subject matter of broad allegations to the subject matter of certain potentially-applicable sections of the Code of Federal Regulations.

In the same way, it is clear that KCS cannot plausibly complain about the trial judge's observation at oral argument of the motion that preemption would not lie as long as there were any allegations by plaintiffs which, on their face, were not subject to preemption. KCS apparently feels that this observation is too sweeping, and that perhaps it was entitled to *partial* relief, if not full relief, by having the trial judge consider the possibility that certain claims might be preempted, and other claims not preempted. But KCS, not the trial judge, is responsible for painting this preemption analysis with a broad brush of generalization; and the fact is that the procedural device invoked herein for the consideration of the preemption issue does not allow partial relief (as distinguished, for example, from a summary judgment motion addressed to specified claims). KCS raises preemption by means of a motion which by nature seeks a *complete* dismissal of the action against the defendant on the basis that *all* of the plaintiff's allegations, even if admitted true, do not form a legal basis for recovery from the defendant. Partial summary judgment was not sought and is not under review. KCS chose to pursue an "all or nothing" approach below. Under Article 965, the trial judge's observation — like her ruling — was entirely proper and correct.

II.

KCS HAS THE BURDEN TO DEMONSTRATE THAT ITS LEGAL RIGHT TO A DISMISSAL OF ALL CLAIMS AGAINST IT IS "CLEARLY ESTABLISHED".

The similarities between the standards governing motions for judgment on the pleadings and motions for summary judgment are recognized in Louisiana jurisprudence. *See Seay v. Wilson*, 536 So. 2d 495 (La. App. 1988). A judgment can be granted in either case only "as a matter of legal right," and only in the absence of factual issues bearing upon same. *See id.* At 498. The guidelines for both types of motions, therefore, make it clear that the movant can prevail "only when the legal right [asserted by the motion] is clearly established" as a matter of law. *Id.*

The petitioner's motion below was properly denied if only because fact issues abound as to the specifics of the claims of tort liability asserted against it.

In deciding a motion under Article 965 (as in the case of a summary judgment motion under Article 966), the trial court has broad discretion. *See, e.g., Smith v. Parker*, 59 So. 2d 718 (La. App. 1952). For this reason, the refusal to render a judgment on the pleadings under Article 965 is not subject to review on appeal. *See Beam v. Dudding*, 443 So. 2d 73 (La. App. 1950).

III.

UNDER ARTICLE 965, KCS MUST BE CONSIDERED TO HAVE VIOLATED MULTIPLE PROVISIONS OF LOUISIANA TORT LAW, AS WELL AS MULTIPLE INDUSTRY RULES AND GOVERNMENT REGULATIONS.

The PLC's Second Consolidated Amended Master Petition (excerpt attached as Appendix B) contains the following allegations, which for present purposes must be considered factually true and admitted:

1. KCS "stored, handled, and/or transported" the hazardous and toxic chemicals involved in this litigation [¶18];

2. KCS accepted, shipped and turned over to Illinois Central Railroad a tank car which at that time was in an "overweight and/or defective condition" [¶42];

3. KCS failed to "account and prepare" for the various "hazards" involved in the "storage, handling and transportation" of the hazardous material contained in this railroad tank car [¶¶40(a) and 41];

4. KCS failed to "discover or repair" certain "damage or defects" in the railcar, and also failed to properly "inspect, test, maintain, or equip" the car [¶¶40(b)&(c) and 41];

5. KCS failed as an employer to properly screen, select and hire persons of skill and competence to perform services with respect to this railcar [¶¶40(f) and 41];

6. KCS failed to develop a proper protocol for a response to the hazardous chemical emergency involved in this litigation [¶¶40(g)&(l) and 41];

7. KCS failed to abide by not only federal laws and regulations, but also state and local laws and regulations, industry-wide practices, and internal standards and procedures [¶¶40(j)&(k) and 41];

8. KCS had care, custody and/or control of a dangerous railcar, within the meaning of Article 2317 of the Louisiana Civil Code [¶43];

9. KCS caused or allowed the "unauthorized leaks of toxic and hazardous vapors, fumes, and chemical materials," in violation of Louisiana Civil Code Articles 667-669 [¶47]; and

10. KCS caused harm in the conduct of an "ultra hazardous activity" within the meaning of Louisiana's absolute liability law [¶48].

Based upon such admitted factual indicia of wrongdoing, KCS cannot now suggest to this Court that it has "only the most tangential connection to the chemical release . . ." (pp. 3-4, Petitioner's Brief), and that it played on "obviously minimal" role in the catastrophe (p. 22, Petitioner's Brief). On the contrary, its extensive involvement must be conceded, as pled, in order for it to bring its motion for dismissal on the pleadings. Moreover, petitioner's acceptance, movement and transfer of a dangerously overloaded and overweight hazardous materials railcar *was* central in the events leading up to the chemical release. Before ever accepting and moving this railcar, KCS received from Vicksburg Chemical, the shipper which had loaded the car, a bill of lading which clearly revealed the car to be overloaded, overweight, and therefore unsafe for movement and delivery to Gaylord. KCS nonetheless accepted and moved the railcar. The problem with the car remained undiscovered and unaddressed, enabling the eventual catastrophe.

Both legally and factually, petitioner is in no position to characterize itself as less than a major tortfeasor in this case.

IV.

KCS HAS MISCONSTRUED AND MISAPPLIED THE PREEMPTION DOCTRINE.

In raising preemption as it has, KCS appears intent on trying to find advantage in the generality of the language used in the plaintiffs' petition, apparently arguing that any identity of subject matter between these general allegations and that which is covered by federal railroad regulations, entitles it to preemption. In truth, the opposite holds. The very generality of these allegations fundamentally discounts the railroad's position, since any and all plausible, factual activity referred to in the plaintiffs' generally-pled allegations may form a basis for liability under state law; and, procedurally, all factual allegations from which the more specific claims are inferable, must be deemed admitted.

The federal regulations to which KCS refers do not constitute a comprehensive "federal blanket" of immunity, covering *in toto* each and every conceivable, tortious activity for which this railroad is sought to be held accountable under Louisiana tort law.

It is KCS, therefore, which has misunderstood and misapplied the doctrine of preemption. The foundation for preemption is the "Supremacy Clause" of the United States Constitution, which provides that federal law shall be "supreme," any state law *to the contrary* notwithstanding. *See* Article VI, U.S. Const. The ultimate question for this Court must be whether a specific provision of federal law would be impeded or frustrated if otherwise applicable state tort law were given effect. But petitioner can make no showing that any state law claims or theories of liability asserted by the PLC would either frustrate in some way, or conflict with, specific federal regulatory provisions or standards, even though this is the

very tension which lies at the heart of preemption. It is not enough to suggest that uniform federal regulations exist in the general area of railroad or railcar safety. KCS instead must show that the Louisiana tort law *invoked in this case*, would specifically operate to impede or impair a federal regulatory provision. This is the proof needed for preemption, but it has not been made by KCS for the simple reason no such proof exists.

Preemption is available as a defense to state tort claims only when an established presumption in favor of the application of state law is overcome; and, in cases of "express preemption" (such as KCS seeks to make here), this presumption is overcome only through a clear, unequivocal manifestation of Congressional intent to set aside sovereign state law. That manifestation is utterly lacking herein, with respect to the Louisiana tort law on which plaintiffs base their case.[2]

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2. In its brief (at pages 21-22, fn. 17), KCS also suggests that federal regulation of railroads is so extensive as to warrant an across-the-board doctrine of *implied* preemption of all state tort law in cases against railroads. In *Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995), state common-law claims against the manufacturers of certain tractor trailers were held not impliedly preempted by the National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S.C. § 1381 *et seq.*), because, among other things, a finding of liability under state law in no way would undermine or conflict with the federal objectives or purposes with respect to the regulated equipment in question. For the purpose of implied preemption, as well as express preemption, it therefore continues to be the underpinning of judicial analysis that some demonstrated frustration of federal interest will result from the operation of state law. Without this, the rationale for preemption ceases to exist, and the presumption against preemption is not overcome.

V.

THIS COURT'S DECISION IN EASTERWOOD SUPPORTS RESPONDENTS' POSITION THAT THIS IS NOT A CASE FOR PREEMPTION.

In *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993), a wrongful death case brought by the widow of a truck driver who was fatally injured in a collision with a CSX train at a railroad crossing in Georgia, plaintiff alleged that under Georgia tort law the railroad was negligent for: (1) failing to maintain adequate warning devices at the crossing; and (2) operating the train at an excessive speed. The defendants sought summary judgment on the ground that these claims were preempted under the Federal Railroad Safety Act [FRSA], 49 U.S.C. § 20101 *et seq.*

This Court articulated both the underlying rationale of the preemption defense in cases where state tort law is sought to be applied, and the established presumption against displacing such law on the basis of preemption. The concept of preemption, the Court noted, derives from the "Supremacy Clause" in Article VI of the United States Constitution, pursuant to which a state law which "conflicts with or frustrates federal law . . . must give way"; and

> [i]n the interest of avoiding unintended encroachment on the authority of the States . . . a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption. Thus, preemption will not lie unless it is "the clear and manifest purpose of Congress."

507 U.S. 663-64 [citation omitted].

Against this important conceptual backdrop, the Court in *Easterwood* based its analysis on the express text and structure of the FRSA as paramount indicators of Congressional intent. It observed that the stated purpose of the Act was to generally promote railroad safety through a directive that the Secretary of Transportation prescribe appropriate rules, regulations, orders, and standards for same, but with the express acknowledgment that each State was free to enact and enforce its own laws or standards pertinent to railroad safety, "until such time as the Secretary has adopted a rule, regulation, order or standard *covering the subject matter* of such State requirement. . . ." 49 U.S.C. § 20106.

The decision in *Easterwood* therefore hinged on the interpretation of the statutory phrase "covering the subject matter" (of state law). This Court's balanced and well-reasoned interpretation should continue to govern, and it is worth noting *verbatim*:

> To prevail on the claim that the regulations have preemptive effect, petitioner must establish more than that they "touch upon" or "relate to" that subject matter. . . . , for "covering" is a more restrictive term which indicates that *preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law*. . . . The term "covering" is in turn employed within a provision that displays *considerable solicitude for state law* in that its express preemption clause is both prefaced and succeeded by express saving clauses.

507 U.S. 664-65 [emphasis added].

Georgia's tort law provided that railroads had a continuing duty to provide for safe public passage at railroad crossings. *See* 507 U.S. 665 n. 5. The Secretary of Transportation likewise had promulgated a series of federal regulations governing the use of

specified warning devices at crossings, some of which were explicit in defining and categorizing "warning devices." *See id.* at 672 n. 11. But in scrutinizing different sections of these regulations (codified in Title 23 of the C.F.R.) as potential sources of preemption, the Court in *Easterwood* found that none had displaced Georgia's tort law in the case. Specifically, the provisions of 23 C.F.R. § 924 had "little to say about the subject of negligence law," and were actually complemented by a state scheme of tort liability (507 U.S. at 667-68); the provisions of 23 C.F.R. §§ 655.601-603 (a uniform manual on traffic control devices) made no effort to prescribe "an alternative scheme of duties incompatible with . . . Georgia negligence law" (507 U.S. at 670); and the provisions of C.F.R. §§ 646.214(b)(3) and (4), while potentially preemptive of competing state law claims regarding the installation of warning devices, did not apply in the absence of federal funding for the crossing in question (507 U.S. at 670-73).

Hence, federal regulations well might *deal with* warning devices at crossings, but still did not *subsume* this subject matter to preclude application of a state tort claim addressed to warning devices at crossings. The critical aspect of this analysis reflects the purpose of preemption, i.e., to set aside state law which competes with and frustrates applicable federal law.

At the same time, there were in *Easterwood* applicable C.F.R. provisions establishing a safe maximum and allowable speed for trains, according to the "class of track" on which a train traveled. The maximum speed under these regulations was sixty miles per hour. Plaintiff conceded that the train in this case was traveling at a lesser speed, but contended that it nonetheless was going fast enough to violate the railroad's duty under state tort law to operate the train at a "moderate and safe rate of speed." 507 U.S. at 673. As distinguished from the issue of warnings devices at crossings, this was an instance in which the plaintiff sought to invoke state tort law in a way which would directly conflict with and contradict the "safe" speed specified in applicable federal regulations. It was

precisely because such an attempted reliance on state tort law would be "incompatible with the FRSA and the Secretary's regulations," that Georgia's tort law regarding a safe train speed necessarily yielded on the basis of preemption. *See id.* at 675.

Notably, even this finding of preemption as to the plaintiff's speeding claim was not considered in *Easterwood* to be preemptive of other possible "related" tort claims of unsafe train operation. The defendant CSX even conceded in the case "that the preemption of [the] excessive speed claim does not bar suit for breach of related tort law duties, such as the duty to slow or stop a train. . . ." 507 U.S. at 675 n. 15. Accordingly, the Court made clear that

> this case does not present, and we do not address, the question of FRSA's preemptive effect on such related [tort] claims.

Id. Such "related" tort claims, in other words, might well deal with the *subject area* of train movement or operation; but federal regulations only *subsumed* the subject so as to justify preemption if such state law was incompatible with a specified regulatory standard for the precise activity or conduct at issue.

Respondents therefore submit that the holding of *Easterwood* actually supports the result reached in the rulings of the trial and appellate courts in this matter. *Easterwood* holds that:

(a) express preemption based upon federal statutory language generally is available only in narrow circumstances where there is a "clear and manifest" Congressional intent or purpose to preempt state tort law;

(b) the FRSA is preemptive of state tort law *only* to the extent federal law or regulation *substantially subsumes* and occupies the subject of the state tort law in question, as opposed to simply "dealing with" or "touching upon" that subject matter; and

(c) express preemption under the FRSA is further reserved for cases in which there is an attempt to apply state tort law in a way which frustrates, contradicts, or is in conflict with, federal law or regulatory interests.

Recent federal appellate jurisprudence also illustrates the proper application of *Easterwood* so as not to justify preemption herein.

In *Michael v. Norfolk Southern Ry. Co.*, 74 F.3d 271 (11th Cir. 1996), the Eleventh Circuit reversed a lower court ruling that the plaintiffs' claims for negligent maintenance of a railroad crossing and for failure to warn the public of the defective nature of the crossing, were preempted under certain federal regulations which dealt with the subject matter of rail crossings. It did so because the regulations dealt "with the design and installation of new warning devices, not the maintenance of those devices or the failure to warn the public of defective devices." *Id.* at 273.

Similarly, in *Kiemele v. Soo Line R. Co.*, 93 F.3d 472 (8th Cir. 1996), the defendant railroad asserted that "any claim" under state law dealing with "the sufficiency of warning" at crossings, was preempted federally. However, the Eighth Circuit disagreed, stating that the railroad's state law duty of care was viable in requiring that warning devices be actually installed and operating at the time of the incident causing injury. *See id.* at 475-76.

Under the KCS interpretation of *Easterwood*, such cases would have resulted in preemption simply because the state tort law invoked dealt with the same subject matter (railroad crossings) as do certain detailed federal regulations. However, as *Easterwood* and its jurisprudential progeny make clear, the FRSA's preemption language cannot be so broadly interpreted or applied.[3]

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3. As noted, the lack of federal funding for the crossing involved in *Easterwood* was controlling as to the applicability and preemptive effect of (Cont'd)

In the case at hand, the plaintiffs' tort law claims against KCS do not conflict with, or establish incompatible duties or standards of conduct when compared to, any of the federal regulations cited by defendants. Neither do any of these federal regulations evidence a "clear and manifest" intent by Congress or by the Secretary of Transportation to totally preclude the applicability of state tort law. The fact that certain federal regulations may deal with or touch upon the areas of railroad safety to which Louisiana tort law also is sought to be applied in this case, clearly is not sufficient for preemption under the FRSA, as interpreted by *Easterwood* and its progeny. Rather, KCS must show that a specific Louisiana tort law claim conflicts with a federal regulation in an area or on a subject substantially subsumed by that federal regulation. If so, the application of state tort law would frustrate and conflict with that federal regulation. Otherwise, as in this case, preemption does not occur.

The Louisiana tort law claims herein, not unlike the Georgia tort law claims in *Easterwood* dealing with warnings at railroad crossings, actually are in harmony rather than in conflict with whatever federal regulations may apply to the various subject areas

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(Cont'd)

certain federal regulations. Interestingly, however, in both *Michael v. Norfolk Southern Ry. Co.*, and *Kiemele v. Soo Line R. Co.*, *supra*, federal funding *was* involved with the crossing devices at issue. Nonetheless, both the Eighth and Eleventh Circuits in these cases applied *Easterwood* to preclude preemption of the plaintiffs' state law claims, because those claims were distinguishable in effect from the specific thrust and targeted conduct of the federal regulation (*e.g.*, the allegedly negligent *maintenance* of crossing devices, as opposed to the design and installation of same, as in *Michael*).

Petitioner herein thus fails to recognize the fundamental principle of preemption, pursuant to which it is not the mere existence or applicability of federal regulations in a subject area which justifies preemption, but the demonstrated incompatibility of applying state tort law in a way which conflicts with a federal regulatory provision.

of railroad safety. Louisiana tort law does not operate to *regulate* in these areas, in competition with the regulatory scheme of the C.F.R. No differing standards of activity or conduct are sought to be imposed. There is no tension by virtue of state law operating to frustrate federal law in an area subsumed by federal law; and, hence, there is no preemption as intended under the FRSA. *Compare CSX Transportation, Inc. v. Public Utilities Comm'n of Ohio*, 901 F.2d 497 (6th Cir. 1990), *cert. denied*, 498 U.S. 1066, 111 S. Ct. 781, 112 L. Ed. 2d 845 (1991) [FRSA preemption of a concurrent and comprehensive state regulatory scheme for hazardous materials transportation] *with Southern Pacific v. Or. PUC*, 9 F.3d 807 (9th Cir. 1993) [*no* FRSA preemption of Oregon regulations dealing with the *use* of train whistles, notwithstanding C.F.R. regulation as to the sound-producing *capacity* of train whistles].

VI.

SEVERAL EXAMPLES SUFFICE TO SHOW THAT THE C.F.R. PROVISIONS CITED BY KCS CANNOT AND DO NOT COVER, MUCH LESS SUBSUME, THE VARIOUS ACTIVITIES AND ISSUES MADE THE SUBJECT OF THIS CLASS ACTION IN TORT.

Again because of the procedural irregularity of its vehicle for raising the preemption issue, KCS purposefully does not invite this Court to refer to the specific aspects or details of plaintiffs' case against it, as revealed in discovery. Instead, it attempts to "match" the subject matter of generally-pled allegations with the subject matter of various C.F.R. provisions, and from this "matching," seeks to conjure a case for preemption. Incredibly, KCS also asserts that a general allegation of "negligent fault" in one paragraph of the Master Petition should be disregarded, because it is so vague as to not be "susceptible to preemption analysis." *See* Petitioner's Brief at p. 15, fn. 13. In this way, KCS would like to hide beyond the permissive generality of the pled allegations only when it finds it helpful to do so.

A few obvious examples nonetheless suffice to demonstrate how the activities made the subject of this tort case against KCS do not logically or conceivably fit entirely under some "umbrella" of incompatible and preemptive federal railroad regulation.

The allegations in paragraphs 40(f) and 41 of the petition that KCS failed to properly "screen, select and hire" employees and contractors, are, according to KCS, preempted because of certain federal regulations (49 C.F.R. § 172) regarding the training of hazardous material employees. *See* Petitioner's Brief at pp. 7-8, fn. 5. But there is absolutely no basis for suggesting that federal regulatory provisions for the training of "hazmat" employees, "substantially subsumes" the entire subject area of how a railroad *screens*, *selects* and *hires* — as opposed to *trains* — any number of individuals (whether employees or independent contractors) whose incompetence may have contributed to the catastrophe in this case. For example, how KCS screens and selects those individuals who process bills of lading, has nothing whatsoever to do with how it may train "hazmat" employees.

It is further alleged, in paragraphs 40(j) and (k) and 41 of the petition, that KCS failed to follow both industry-wide and company practices in the handling and transportation of N204. KCS presumably believes this claim is preempted by some or all of the various provisions it cites in Title 49 of the C.F.R. *See* Petitioner's Brief at pp. 7-8, fn. 15. However, to infer from this general plaintiffs' allegation an example pertinent to this case, i.e., that the railroad's failure to follow safe practices consisted, among other things, of ignoring critical overweight information on a bill of lading in its actual possession before it accepted and moved the loaded railcar, is to specify a claim that the railroad knew or should have known that this railcar was overloaded and weighed approximately 9,500 pounds more than the stenciled and published "gross weight on rail" limit for this car. Specific written standards, not promulgated by the federal government but by the industry organization to which KCS subscribes (the American Association

of Railroads, or AAR), absolutely prohibit the movement and transfer of such an overloaded and overweight car. The company policy of KCS also prohibits this. But there are *no* C.F.R. provisions specifying an alternative, much less incompatible, standard of conduct in regard to this particular subject matter or activity. Hence, one of the most important theories of fault alleged by plaintiffs, focused on the fact that this railroad should have refused to move a railcar shown to be overweight in the bill of lading it had received from a shipper, is in no way covered, "subsumed," or preempted by the provisions of the C.F.R.

A related issue in this litigation is the alleged negligence which occurred in "interchange," when KCS transferred the overloaded railcar to Illinois Central in Jackson, Mississippi. To assert preemption in this area, KCS apparently cites 49 C.F.R. § 174.10, a regulatory provision which deals with the inspection of leaking railcars during interchange. *See* Petitioner's Brief at p. 7, fn. 5. Again, if the specific fault arises from KCS turning over to another railroad in interchange a car which was dangerously overweight and overloaded with hazardous materials, this is conduct as to which none of the cited regulations pertain, much less subsume through specific standards or provisions.

To proceed with other specific examples of why the state tort claims specifically being pursued herein are *not* preempted by the cited provisions of the C.F.R., would be a tedious and unnecessary exercise. In the final analysis, it is not plaintiffs' burden to give specific examples of fault under the generally-pled allegations in the Master Petition, in order to prove why this is *not* a case for preemption. KCS is the proponent of this extraordinary effort to achieve total immunity from the consequences of state tort law. *It* has the burden to demonstrate how any or all of the specific, asserted theories of liability under Louisiana law are incompatible with applicable federal regulations. Such a burden, however, is not satisfied by simply categorizing the broad language of plaintiffs' pleadings and noting that there are federal regulations

dealing with or touching upon some generally "matched" subject areas of railroad safety in regard to hazardous materials.

The underlying facts of this case, now well-developed through discovery, give life to the general allegations of the petition. Those facts make it clear that the federal regulations cited by KCS are silent as to the railroad's specific conduct made the subject of plaintiffs' claims of tort liability under Louisiana law. Since these specific claims of tortious liability condemn the petitioner's preemption argument, it is understandable why KCS has endeavored to conceal them from the Court through a discussion limited to general "subject matter." In doing so, however, the petitioner fails utterly to demonstrate the state-federal conflict and incompatibility necessary for preemption.

VII.

THE GOVERNING JURISPRUDENCE OF LOUISIANA IS CONSISTENT WITH EASTERWOOD.

In *Haydel v. Hercules Transport, Inc.*, 654 So. 2d 418 (La. App. 1995), claims for compensatory and punitive damages under Louisiana law were brought against the carrier of a hazardous substance released because of malfunctioning equipment on a tank truck. The defendant contended that certain provisions of the Hazardous Materials Transportation Act [HMTA], 49 U.S.C. § 5101 *et seq.* — and, more specifically, 49 U.S.C. §§ 5125(b) & 5123 — expressly preempted plaintiffs' state law claims for punitive damages under Article 2315.3 of the Civil Code. Echoing the weight of jurisprudential authority on preemption already discussed, the appellate court began by noting the premise of federal-state law *conflict* which lies at the heart of the preemption defense:

> The preemption doctrine has its roots in the Supremacy Clause of the United States Constitution (Article VI, clause 2), which invalidates state laws

> that "*interfere with, or are contrary to*" federal law [citations omitted]. Basic to this constitutional command is the notion that all state provisions which *conflict with* federal law are without effect [citation omitted].

654 So. 2d at 423 [emphasis added].

Due to the "basic assumption that Congress did not intend to displace state law," the court then proceeded to carefully scrutinize the purpose, language, and context of the HMTA. *See* 654 So. 2d at 424. In pertinent part, the statute provides for the preemption of "a law, regulation, order or other requirement of a State . . . that is not substantively the same" as regulatory provisions under the Act dealing with specified subject matters. 49 U.S.C. § 5125(b)(1). Under 49 U.S.C. § 5123, the Act set forth a civil penalty for violation of any of the provisions of HMTA.

Defendants in *Haydel* argued that the punitive damage claims under Louisiana law in the case were preempted in two ways: first, under the express language of Section 5125(b), this Louisiana law was "not substantively the same" as federal regulations on the subject of the handling of hazardous materials; and, secondly, the Act in Section 5125(a)(2) expressly preempted any state requirement that was "an obstacle to accomplishing and carrying out" the regulatory aims of the Act. The express purpose of the HMTA, however, was noted by the appellate court to be the protection of life and property against risks inherent in the transportation of hazardous materials, through the *regulatory and enforcement authority* of the Secretary of Transportation. *See* 654 So. 2d at 425. Article 2315.3 of the Civil Code, on the other hand, did not address this "regulatory and enforcement authority" of the Secretary, and neither did the Article seek to designate specific materials as hazardous, or regulate the transportation or handling of such materials. For this reason, Louisiana state law could not be seen as "substantively" different from, much less in conflict

with, the federal regulations promulgated under the HMTA. *See id.* at 425.

The Fourth Circuit Court of Appeal in Louisiana more recently has addressed the defense of express preemption under the FRSA, in a case somewhat factually similar to this one. *See In re New Orleans Train Car Leakage*, 671 So. 2d 540 (La. App. 1996). There, a class action seeking compensatory and punitive damages was brought against several carriers alleged to be responsible for the explosive release of butadiene from a leaking railroad tank car. The defendants sought preemption, and appealed from the trial court's denial of the summary judgment motions by which they raised this defense. Once again, the appellate decision noted that preemption extends only to situations in which state law interferes with or is contrary to federal law. *See* 671 So. 2d at 544. Moreover, consistent with the presumption against preemption, and in the interest of avoiding encroachment on the sovereign authority of the States, the defense of express preemption under a federal statute was seen as requiring close scrutiny of both the express text and the structure of the statute at issue. *See id.* at 545.

The court in *New Orleans Train Car* held that the FRSA would preempt only a state law claim which was shown to frustrate and conflict with a specific, federal provision of law. It properly observed the previously-noted reservation in the *Easterwood* opinion, whereby this Court recognized that even the preemption of the state law speeding claim did *not* bar a claim for the breach of "related tort law duties, such as the duty to stop or slow a train. . . ." Defendants ultimately were unable to make the requisite showing that Louisiana law claims for punitive damages in the case were in conflict with, or preempted by, any specifically, applicable regulations under the FRSA.

This Court properly denied *certiorari* in *New Orleans Train Car*. *See* 117 S. Ct. 512 (1996). It is a decision consistent with *Easterwood*, and correct in its result.

Thus, although KCS suggests that Louisiana jurisprudence generally has misapplied *Easterwood*, Louisiana courts consistently have followed the *Easterwood* analysis in deciding whether preemption is justified. To the extent a difference in purpose between federal regulatory and state tort schemes has been noted in the case law, it has been noted to illustrate the viable coexistence of these schemes where no federal interest is frustrated by sovereign state law. Petitioner apparently would prefer a different scenario, in which federal regulation of the railroad industry automatically negates any and all state tort law addressed or applied to the same general subject of railroad safety. So drastic view was not espoused by this Court in *Easterwood*, and certainly should not be endorsed now. Most fundamentally, it is not a view which finds support in any of the express Congressional enactments on which KCS has endeavored to build a case for preemption.

CONCLUSION

Nothing in the express language of the FRSA or the HMTA, and certainly nothing implied in the federal regulation of railroad or railcar activity, preempts the state tort law claims which are pursued against KCS in this matter. Any question whether this is so, surely is resolved by the interpretation, analysis, and holding of this Court in *Easterwood*, as well as the federal and Louisiana cases which consistently have applied *Easterwood*.

In the final analysis, KCS seeks total immunity through preemption because it perceives a "compelling need for uniform federal regulation." (Petitioner's Brief at p. 23). But if complete tort immunity through preemption were this easily justified, virtually every claim against a railroad now pending in the courts of this land, whether due to hazardous material leakages or railcar derailments, would be eliminated regardless of the merits. Federal railroad regulation *per se* does not usurp accountability under the tort law of the sovereign states on such a wholesale basis. Congress has not provided for this, and neither have the courts.

The thrust of this action in tort against KCS is not to *regulate* the railroad or railcar industry in competition or in conflict with the federal government. The thrust of this action is to seek damages for the violation of Louisiana tort law. The prospect that this — or any — railroad, in addition to being federally regulated, also might be held answerable under a state's tort law, surely has not been negated by the existence of numerous of federal regulatory provisions regarding railroad activity.

By simply showing that such regulations relate to or deal with some of the subject areas of railroad safety involved in this tort case, and that those federal regulations which do exist are meant to be uniform in nature, KCS does not — and cannot — make the showing which is a *sine qua non* of the preemption defense, namely: that a specific federal regulatory provision, interest, or law will be defeated, impeded, impaired, or in some way contradicted by holding this defendant responsible under the tort law of the community which has been damaged by its wrongdoing. Not a single theory or claim by plaintiffs has been shown to establish a standard of conduct for KCS which is incompatible with what KCS must do to comply with federal regulations. No showing of this essential element of preemption has been made by petitioner, and none can be made.

The courts below were correct in concluding that KCS's attempt at preemption through a Motion for Judgment on the Pleadings is without merit. KCS unquestionably has failed to carry its burden under Article 965 of demonstrating both a clearly established right to preemption as a matter of law, and the absence of factual issues pertinent to preemption. The narrowness and irregularity of raising preemption based only on generally-pled allegations, are themselves sufficient reasons for this court to decline the exercise of *certiorari* jurisdiction in this case.

This petition should be denied.

Respectfully submitted,

GERALD E. MEUNIER
Counsel of Record
GAINSBURGH, BENJAMIN,
DAVID, MEUNIER
& WARSHAUER
Plaintiffs' Liaison Committee,
appearing for Respondents
2800 Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163
(504) 522-2304

REGINALD J. LAURENT
Plaintiffs' Liaison Committee,
appearing for Respondents
3843 Coventry Street
Slidell, Louisiana 70458
(504) 847-1657

STEPHEN B. MURRAY
Plaintiffs' Liaison Committee,
appearing for Respondents
Murray Law Firm
909 Poydras Street, Suite 2550
New Orleans, Louisiana 70112
(504) 525-8100

DANIEL E. BECNEL, JR.
BECNEL, LANDRY & BECNEL
Plaintiffs' Liaison Committee,
appearing for Respondents
P. O. Drawer H
Reserve, Louisiana 70084
(504) 536-6445

APPENDIX A — JUDGMENT OF DIVISION "C" OF THE TWENTY-SECOND JUDICIAL DISTRICT FOR THE PARISH OF WASHINGTON OF THE STATE OF LOUISIANA FILED NOVEMBER 10, 1997

NO: 73,341 — Div. "C" — ALL CASES

22ND JUDICIAL DISTRICT
PARISH OF WASHINGTON
STATE OF LOUISIANA

IN RE: CHEMICAL RELEASE AT BOGALUSA

JUDGMENT

The Court having considered the applicable law, evidence, argument and post-hearing briefs of counsel, and for the reasons assigned this date,

IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment herein in favor of the plaintiffs, and against all defendants herein, granting the Motion for Class Certification pursuant to Louisiana Code of Civil Procedure articles 591, et seq., as those articles existed at the time this suit was filed.[1]

IT IS FURTHER ORDERED that the class shall be defined as follows:

> All persons and legal entities located or residing in, owning places of business or property in, operating

1. The 1997 amendments to these articles apply only to actions filed on or after its effective date. 1997 La. Acts, No. 839, Sec. 3. The Act was approved on July 10, 1997.

businesses in, or attending school or working in, and/or who were present within the geographic area specified herein, who sustained bodily and/or personal injury, loss, property damage, as the result of an explosion, rupture, escape and/or leak or leaks of nitrogen tetroxide (N_2O_4) and their derivatives from a railway tank car, mobile truck tractor-trailers, and/or related loading/unloading piping or other structures located on the premises of Gaylord Chemical Corporation in Bogalusa, Louisiana, occurring in and during October 1995, as well as those family members of such persons who may themselves have claims arising out of injury to such persons.

The geographic boundaries of the class are defined below. The definition includes a reference to the "City Rectangle" which will be defined as the area within the smallest rectangle which will encompass all of the City Limits of Bogalusa The class boundaries will be the area within the following truncated wedge-shaped region: 1) begin at the southeast corner of the City Rectangle, and extend the line comprising the southern side of the City Rectangle until the point at which it reaches the Pearl River. 2) then follow the western bank of the Pearl River northward until reaching the northeastern most point of the boot of Louisiana; 3) from that point, draw a straight line to the confluence of Gully Creek, Upper Little Creek and Kellers Creek in Marion County, Mississippi; 4) from the confluence of those three creeks in Marion County, Mississippi, draw a straight line in a westerly direction to the

intersection of State Highway 570 and U.S. Highway 51 in Pike County, Mississippi; 5) then from the intersection of State Highway 570 and U.S. Highway 51 draw a straight line to the Southwestern corner of the City Rectangle, in Washington Parish Louisiana, 6) continue east along the southern boundary of the City Rectangle until reaching the point of beginning at the southeastern corner of the City Rectangle.

IT IS FURTHER ORDERED that the following sixteen (16) named plaintiffs be and hereby are confirmed as representatives of the class certified herein:

1. Dunaway, Joe
2. Freeman, Tyrone
3. Garie, Charlene
4. George, Jennifer
5. George, Devon
6. Hartzog, Mary Ann Molly
7. Johnson, Edward
8. King, Alberta
9. McKenzie, Kimberly
10. Parker, William
11. Shreve, Kim
12. Smith, Kara
13. Sorenson, George
14. Thomas Jr., Leon
15. Watkins, William
16. Watts, John

The Court finds that the claims of the above-named 16 plaintiffs and the claims of the class have a common character and that

the claims of the above-named plaintiffs are typical of the members of the class certified herein. The Court also finds that none of the above-named plaintiffs has any interest in the outcome of this class action litigation that is adverse to the interests of the absent members of the class and that all are willing to serve in that capacity.

IT IS FURTHER ORDERED that the following attorneys have the necessary skill, background, expertise and experience, and absence of any conflict of interest, in order to be designated class counsel and are hereby appointed as such, namely: 1. Suzette M. Peychaud Bagneris; 2. Daniel E. Bocnel, Jr., Joseph M. Bruno; 4. Roy K. Burns, Jr.; 5. Sondra A. Cheek 6. Thomas Discon; 7. James S. Farmer; 8. Calvin C. Fayard, Jr.; 9. Wendell Gauthier; 10. Reginald J. Laurent; 11. Gerald B. Meunier; 12. Stephen B. Murray; 13. Michael J. Paduda 14. Ronnie G. Penton; 15. Edward A. Robinson, III; 16. W. Hugh Sibley; 17. Vernon P. Thomas; 18. Raymond Charles Vinct, Sr.; and, 19. Jesse Wimberly.

IT IS FURTHER ORDERED and the Court finds that it is necessary and appropriate to appoint the following attorneys to continue serving as co-lead counsel on behalf of the class: Gerald E. Meunier, Ronnie G. Penton, and Reginald G. Laurent. The Court also appoints James S. Farmer to continue serving as liaison counsel on behalf of the Plaintiffs' Liaison Committee.

IT IS FURTHER ORDERED that the class should be subdivided into the following subclasses:

1. Bodily/personal injury claims (including loss of consortium); 2. Property damage claims (both real and personal

property); 3. Economic losses (including, but not limited to, lost profits, lost wages, or business interruption); 4. Evacuation damages; 5. Fear and fright claims; and 6. Punitive/exemplary damages.

IT IS FURTHER ORDERED that the punitive exemplary damages subclass shall not be a mandatory no opt-out subclass.

IT IS FURTHER ORDERED that class counsel commence to give proper notice — as required by law and consistent with this Court's Reasons for Judgement and with CMO No. 2 — to all punitive class members who live within geographic boundaries as set forth above in the definition of the class which has been certified herein after such time as this Court approves said notice.

Franklinton, Louisiana, this 10th day of November, 1997.

s/ Patricia T. Hedges
PATRICIA T. HEDGES
JUDGE, DIVISION "C"
22ND JUDICIAL DISTRICT COURT
STATE OF LOUISIANA

APPENDIX B — EXCERPTS FROM SECOND CONSOLIDATED AMENDED MASTER PETITION FILED JULY 2, 1997

22ND JUDICIAL DISTRICT COURT

NO. 73,341, "C," ALL CASES

WASHINGTON PARISH, LOUISIANA

s/ Faye Kieley

DEPUTY CLERK

FILED: July 2, 1997

IN RE CHEMICAL RELEASE AT BOGALUSA

SECOND CONSOLIDATED AMENDED MASTER PETITION

THE PETITION of certain persons of the full age of majority, more specifically referred to herein, and appearing individually and on behalf of all others similarly situated, through undersigned counsel, respectfully represents that:

1.

On October 23, 1995, at approximately 4:45 P.M., a railroad tank car ruptured and toxic and hazardous materials entered into and upon the air, land and water of the City of Bogalusa and surrounding areas in Washington Parish of the State of Louisiana. These substances had been leaking prior to October 23, 1995, while the tank car and related structures were situated at a commercial industrial facility owned and/or operated by

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Gaylord Chemical Corporation and/or Gaylord Container Corporation (hereafter, "the Gaylord facility").

2.

After the explosion and rupture of the tank car, significant amounts of the toxic and hazardous materials entered into the atmosphere, including nitrogen tetroxide, nitrogen dioxide, and nitric acid. These chemicals and associated vapors and fumes were not properly controlled, and for a period of time caused considerable injuries and damages in Bogalusa and in the surrounding areas.

3.

Nitrogen tetroxide is a hazardous material and/or substance.

4.

Nitrogen tetroxide is a toxic material and/or substance.

5.

Nitrogen dioxide is a hazardous material and/or substance.

6.

Nitrogen dioxide is a toxic material and/or substance.

7.

Nitric acid is a hazardous material and/or substance.

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8.

Nitric acid is a toxic material and/or substance.

CLASS ACTION AND PARTIES

9.

This is a class action pursuant to the provisions of Articles 591, *et seq.* of the Louisiana Code of Civil Procedure, and is instituted by the plaintiffs on their own behalf and as representative members of the class.

10.

The class sought to be certified is defined as follows:

> All persons residing in, owning places of business or property in, operating businesses in, attending school or working in, and/or who were otherwise present within, a geographical area to be determined by the Court after the submission of evidence and a hearing thereon, and who sustained bodily and/or personal injury, loss, property damage, and/or other damage, as the result of an explosion, rupture, escape and/or leak or leaks of nitrogen tetroxide (N204) and its derivatives, from a railroad tank car, mobile truck tanker-trailers, and/or related loading/ unloading piping or other structures on the premises of Gaylord Chemical Corporation in Bogalusa, Louisiana, occurring in and during October 1995, as well as those family members who may have claims arising out of injury to such persons.

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11.

Plaintiffs are entitled to have this case maintained as a class action on the following grounds:

(a) The persons or entities constituting the class are so numerous that joinder of all parties is impractical;

(b) As between the named class representatives and the unnamed members of the class, there exists a common character among the rights sought to be enforced through these proceedings;

(c) The named plaintiffs are all members of the class and are suited to provide adequate representation for the unnamed class members;

(d) A majority of the unnamed class members do not have the resources or substantial interest required to prosecute their claims individually;

(e) The common questions and issues of law and fact involved in this matter predominate over questions affecting only individual class members;

(f) Any defense to defendants' liability would be applicable generally to all claims presented by the members of the class;

(g) Prosecution of separate actions by individual class members would create a serious risk of incomplete or inconsistent adjudications, which may prejudicially affect the claims of other class members;

(h) The class action is a superior procedural vehicle for this litigation, and will achieve the primary objectives

of the class action device, including economies of time, effort, and expense, without undue prejudice, and insuring procedural fairness to the parties;

(i) The named plaintiffs are represented by skilled attorneys who are experienced in the handling of mass tort class actions and who may be expected to handle this action in a competent, expeditious, and economical manner, in the best interests of all class members;

(j) The class action procedure is necessary to avoid costly, redundant litigation of the same issues; and

(k) The determination of fault, the appropriateness of exemplary damages, and the bases for determining the amount of compensatory and exemplary damages, may be made in a class action without the necessity of proof at that time as to the quantum for individual plaintiffs, thereby establishing guidelines for settlement and/or subsequent trials in individual cases, as necessary.

12.

Specifically, the named plaintiffs and proposed class representatives herein are:

(a) Darrell Darden, a person of the full age of majority residing in the Parish of Washington, State of Louisiana, who suffered and incurred physical injuries, mental and emotional injuries, medical expenses, economic loss, and damages associated with evacuation from his home, as a result of the exposure to toxic and hazardous materials;

(b) Jennifer and Gary George, individually and as the parents and natural tutrix/tutor of their minor son, Devon George, who suffered, among other things, physical and emotional injuries, resulting in expenses for medical treatment as well as the disruption of his academic activities, as a result of the exposure to toxic and hazardous materials;

(c) Mary Anna "Molly" Hartzog, a person of the full age of majority residing in the Parish of Washington, State of Louisiana, who suffered and incurred physical injuries, mental and emotional injuries, medical expenses, economic loss, and damages associated with evacuation from her home, as a result of the exposure to toxic and hazardous materials;

(d) Edward Johnson, a person of the full age of majority and an inmate at The Washington Correctional Institute in Angie, Louisiana, who suffered physical as well as emotional and mental injuries as a result of the exposure to toxic and hazardous materials;

(e) Kim Shrieve, a person of the full age of majority residing in the Parish of Washington, State of Louisiana, who suffered and incurred physical injuries, mental and emotional injuries, medical expenses, economic loss, and damages associated with evacuation from her home, as a result of the exposure to toxic and hazardous materials;

(f) George Sorenson, a person of the full age of majority residing in the Parish of Washington, State of Louisiana, and employed at The Washington Correctional Institute in Angie, Louisiana, who suffered and incurred physical injuries, mental and emotional injuries, medical expenses, economic loss, and damages as a result of the exposure to toxic and hazardous materials;

(g) Douglas Watkins, a person of the full age of majority residing in the Parish of Washington, State of Louisiana, who suffered and incurred physical injuries, mental and emotional injuries, medical expenses, economic loss, and damages associated with evacuation from his home, as a result of the exposure to toxic and hazardous materials;

(h) John Watts, a person of the full age of majority residing in the State of Mississippi but present in the City of Bogalusa at the time of the events herein, who suffered and incurred physical injuries, mental and emotional injuries, medical expenses, and economic loss as a result of the exposure to toxic and hazardous materials;

(i) William Reed Holloway, a person of the full age of majority residing in the Parish of Washington, State of Louisiana, who suffered and incurred physical injuries, mental and emotional injuries, economic loss, medical expenses, and damages associated with evacuation from his home, as a result of the exposure to toxic and hazardous materials:

(j) John Sumurall, a person of the full age of majority residing in the Parish of Washington, State of Louisiana, who suffered and incurred physical injuries, mental and emotional injuries, economic loss, medical expenses, and damages associated with evacuation from his home, as a result of the exposure to toxic and hazardous materials;

(k) Leon Thomas, a person of the fall age of majority residing in the Parish of Washington, State of Louisiana, who suffered and incurred physical injuries, mental and emotional injuries, economic loss, medical expenses, and damages associated with evacuation from his home, as a result of the exposure to toxic and hazardous materials;

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(l) A legally-appointed Representative of the Estate of Al Garic, to recover both survival and wrongful death damages for the pre-terminal injuries and wrongful death of Al Garic as a result of exposure to toxic and hazardous materials;

(m) Kimberly and Bradley Seal, individually and as the natural tutrix/tutor and representatives of the estate of their minor daughter, Fontana Seal, to recover damages for the pre-terminal injuries and wrongful death of Fontana Seal;

(n) Magic City Recording, Inc., a business located in the vicinity of Bogalusa and operated by Eugene Foster, a person of the full age of majority residing in the Parish of Washington, State of Louisiana, who and which suffered economic loss and business inconvenience as a result of the exposure to toxic and hazardous materials,

(o) Parker's Flower Co., Inc., a Louisiana corporation, owned by William Parker, a person of the full age of majority residing in the Parish of Washington, State of Louisiana, who and which suffered economic loss and business inconvenience as a result of the exposure to toxic and hazardous materials;

(p) Joe Dunaway, a person of the full age of majority, residing in the Parish of Washington, State of Louisiana, who suffered physical and emotional injuries, fear and fright, inconvenience, and expenses associated with evacuation from his home, as a result of exposure (or threatened exposure) to the toxic and hazardous materials;

(q) Alberta King, a person of the full age of majority, residing in the Parish of Washington, State of Louisiana, who suffered physical and emotional injuries, fear and fright,

inconvenience, and expenses associated with evacuation from her home, as a result of exposure (or threatened exposure) to the toxic and hazardous materials;

(r) Tyrone Freeman, a person of the full age of majority, residing in the Parish of Washington, State of Louisiana, who suffered, among other things, property damage as a result of exposure to the toxic and hazardous materials;

(s) Janene Dunaway, a person of the full age of majority, residing in the Parish of Washington, State of Louisiana, who has suffered the loss of society, consortium, nurture, and services of one or more members of her family, as a result of exposure to the toxic and hazardous materials;

(t) Kara Smith, a person of the full age of majority residing in Tylertown, Mississippi, who suffered and incurred physical injuries, mental and emotional injuries, medical expenses, and economic loss, as a result of the exposure to toxic and hazardous materials; and

(u) Elizabeth Porter Ratcliff, a person of the full age of majority residing in Jayess, Mississippi, who suffered and incurred physical injuries, mental and emotional injuries, medical expenses, economic loss and property damage, as a result of the exposure to toxic and hazardous materials.

13.

Made defendants herein are:

a) Gaylord Chemical Corporation [hereinafter, "GC"), a Delaware corporation authorized to do and doing

business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court;

b) Gaylord Container Corporation (hereafter, "GCC"), a Delaware corporation authorized to do and doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court;

c) Vicksburg Chemical Company [hereafter, "VC"], a Delaware corporation doing business in the State of Louisiana, Parish or Washington, and within the jurisdiction of this Honorable Court.

d) Cedar Chemical Corporation [hereafter, "CC"], a Delaware corporation authorized to do and doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court;

e) Union Tank Cat Company (hereafter, "UT"], a Delaware corporation authorized to do and doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court;

f) Illinois Central Railroad Company (hereafter, "ICR"), a Delaware corporation authorized to do and doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court;

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(g) Kansas City Southern Railway Company (hereafter, ["KCSR"], a Missouri corporation authorized to do and doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court;

(h) Nine West Corporation (hereafter "NWC"), a Delaware Corporation, doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court;

(i) Trans-Resources, Inc. (hereafter "TRI"), a Delaware Corporation, doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court;

j) TPR Investment Associates, Inc. (hereafter "TPRI"), a Delaware Corporation, doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court; and

k) Aetna Casualty Company, [hereafter, "ACC"], a foreign insurance company authorized to do and doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court;

l) Agricultural Insurance Company, [hereafter, "AI"], a foreign insurance company authorized to do and doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court;

m) American National Fire Insurance, [hereafter, "ANFI"], a foreign insurance company authorized to do and doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court;

n) Federal Insurance Company, [hereafter, "FI"], an Indiana insurance company authorized to do and doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court;

o) RLI Insurance Company, [hereafter, "RLI"), a foreign insurance company authorized to do and doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court;

p) Reliance National Insurance Company, [hereafter, "RNI"], a foreign insurance company authorized to do and doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court;

q) Royal Indemnity Company, [hereafter, "ROI"), a Delaware insurance company authorized to do and doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court;

r) Transportation Insurance Company [hereafter, "TI"] a foreign insurance company authorized to do and doing business in the State of Louisiana. Parish of

Washington, and within the jurisdiction of this Honorable Court

s) United National Insurance Company, [hereafter, "UNI"], a foreign insurance company authorized to do and doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court;

t) Westchester Fire Insurance Company, [hereafter, "WFI"], a foreign insurance company authorized to do and doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court;

u) American Excess Insurance Association, [hereafter, "AEI"], a foreign insurance company authorized to do and doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court;

v) CAPCO Insurance Ltd., [hereafter, "CAPCO"], a foreign insurance company authorized to do and doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court; and

w) National Union Fire Insurance Company of Pittsburgh, Pennsylvania, [hereafter, "NUFI"), a foreign insurance company authorized to do and doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court;

x) CIGNA Insurance Company, [hereafter, "CIGNA"], a foreign insurance company authorized to do and doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court;

y) Steadfast Insurance Company, [hereafter, "SI"], a foreign insurance company authorized to do and doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court;

z) Reliance Insurance Company, [hereafter, "RI"], a foreign insurance company authorized to do and doing business in the state of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court; and

aa) Illinois National Insurance Company (hereafter "INI"), a foreign insurance corporation authorized to do and doing business in the State of Louisiana, Parish of Washington, and within the jurisdiction of this Honorable Court.

JURISDICTION AND VENUE

14.

There exists jurisdiction over the subject matter of this action, and jurisdiction over the person of each defendant.

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15.

Venue is proper as to each defendant.

LIABILITY

(A) JOINT, SEVERAL, AND SOLIDARY LIABILITY

16.

Liquid nitrogen tetroxide (N204) and its derivative chemical compounds, are hazardous or toxic chemicals which cause substantial, actual, and potential health hazards and detrimental consequences for human beings.

17.

Due to the highly corrosive nature of nitrogen tetroxide and its derivative chemical compounds, nitric acid (HN03) and gaseous nitrogen dioxide (N02) among others, these chemicals cause substantial, actual, and potential damage to all forms of physical property, including crops and all other forms of vegetation, plant and animal life.

18.

On and before October 23, 1995, defendants GC, GCC, VC, CC, UT, ICR, KCSR, NWC, TRI, and TPRI stored, handled, and/or transported the toxic or hazardous substance nitrogen tetroxide and its chemical derivatives to, at, and around the Gaylord facility.

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19.

At the Gaylord facility, nitrogen tetroxide is one of the materials used in the process of manufacturing dimethyl sulfoxide (DMSO) and Dimethyl Sulfide (DMS).

20.

On or before October 23, 1995, rail tank car UTLX 82329 was located at the Gaylord facility. The tank car contained liquid nitrogen tetroxide contaminated with water, forming nitric acid and other chemicals. On information and belief, rail tank car UTLX 82329 developed a leak near its loading/unloading valves, following which there occurred the explosion or rupture of the tank car. On further information and belief, the aforementioned chemicals also leaked from one or more mobile tanks and other related structures in the course of an attempted transfer of the chemicals into same.

21.

The rupture of the tank car caused an acute and catastrophic leakage of nitrogen tetroxide, nitrogen dioxide, nitric acid and other chemicals, creating an extreme risk of hazard to the persons, entities, or property situated nearby and beyond. The leak continued for more than forty-eight hours, causing dispersion of the chemicals and the damages and injuries complained of herein.

22.

Despite knowledge of the commencement and size of the leak and of the toxic and/or hazardous nature of the chemicals

involved, the Gaylord facility did not sound its alarm in the early stages of the leak to warn the public of the impending danger presented by such a substantial exposure to these toxic and hazardous chemicals. The facility also failed to warn the general public by other means.

23.

The dangers created and the damages caused by these chemicals ultimately resulted in the mandatory evacuation of much of the community of Bogalusa, and the voluntary evacuation of many persons in the surrounding communities, at considerable inconvenience, danger, and expense.

24.

Defendants GC, GCC, VC, CC, UT, ICR, KCSR, NWC, TRI, and TPRI are liable jointly, severally, and *in solido* for damages to named plaintiffs and to all members of the class they represent, pursuant to the Louisiana law of negligence, strict liability, absolute liability, product liability, and the wanton or reckless disregard for public safety in the storage, handling or transportation of a hazardous or toxic substance, all as provided for in Louisiana Civil Code Articles 667-669, 2315, 2315.3, 2316, 2317, 2322, 2324, and Louisiana Revised Statutes 9:2800-52, among others.

25.

Plaintiffs specifically contend that any law or laws sought to be applied in a way to restrict or limit defendants' solidary liability, is/are unconstitutional.

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26.

The injuries and damages described herein were caused through no fault of the plaintiffs or those whom they seek to represent, but were solely caused through the legal fault of the defendants, as itemized below.

* * *

39.

Defendants ICR and KCSR participated in transporting the offending tank car of nitrogen tetroxide to the Gaylord facility.

40.

ICR is liable to plaintiffs and other persons and entities similarly situated for negligence, imprudence, and want of skill, in the following non-exclusive particulars:

(a) Failing to properly account and prepare for the hazards attendant upon the storage, handling, and transportation of nitrogen tetroxide;

(b) Failing to discover or repair damage or defects in the tank car used to store or transport hazardous substances;

(c) Negligently inspecting or failing to properly inspect, test, maintain, or equip the tank car;

(d) Accepting from defendant KCSR and proceeding to deliver to the Gaylord facility a railroad tank car in an overweight and/or defective, condition;

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(e) Failing to use proper workmanship in the maintenance and repair of the tank car, and to assure its safe use for the storage and handling of hazardous and/or toxic substances at all times;

(f) Failing to properly screen, select and hire contractors, employees, or other persons to perform services at the facility who due to want of skill and/or prudence, were incompetent to perform these services;

(g) Failing to promulgate, implement, or enforce rules and regulations to prevent or respond to a hazardous substance emergency;

(h) Failing to adequately prepare, plan, equip, or train for the possibility of such a chemical release at the Gaylord facility;

(i) Failing to properly warn plaintiffs of the impending emergency;

(j) Failing to abide by various federal, state and local laws and regulations governing the storage, handling, transportation, reporting, and/or use of toxic or hazardous chemicals such as nitrogen tetroxide, constituting negligence *per se*;

(k) Failing to abide by and/or implement various industry-wide and/or internal company safety and occupational standards and procedures governing the storage, handling, transportation, reporting, and/or use of toxic or hazardous chemicals such as nitrogen tetroxide;

(l) Failing to formulate and/or facilitate a coherent emergency response plan under the circumstances;

(m) Any and all other acts of negligent fault which may be proven at the trial of the merits herein.

41.

Defendant KCSR is liable to plaintiffs and other persons or entities similarly situated for negligence, imprudence, and want of skill in the identical non-exclusive particulars set forth above with reference to the defendant ICR, save for subparagraph (d) of paragraph 40.

42.

In addition, the defendant KCSR is liable to plaintiffs for accepting, shipping, and turning over to ICR, a railroad tank car in an overweight and/or defective condition.

(D) STRICT LIABILITY UNDER ARTICLES 2317, 2322, AND 667-669

43.

Defendants GC, GCC, VC, CC, UT, ICR, KCSR, NWC, TRJ, and TPRI, are strictly liable to plaintiffs and all persons and entities similarly situated, for all injuries and damages caused by the railroad tank car, since at various times pertinent herein, the railroad car, and/or the nitrogen tetroxide and other chemicals it contained, were unreasonably dangerous things in the care, custody, and/or control of each and all of these defendants, within the meaning of Article 2317 of the Louisiana Civil Code.

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44.

The Gaylord facility, including the processing unit, premises, appurtenances, fixtures, and components, were owned and/or operated by GC or GCC.

45.

Defendants GC and GCC are strictly liable to plaintiffs and all persons and entities similarly situated, for all injuries and damages caused by the Gaylord facility, including the mobile tank(s), processing unit, premises, appurtenances, fixtures, and components, since, at all times pertinent herein, the Gaylord facility was an unreasonably dangerous thing in the care, custody, and/or control of these defendants, within the meaning of Article 2317 of the Louisiana Civil Code.

46.

The premises, appurtenances, fixtures, and components of the Gaylord facility, including the processing unit involved in this occurrence, were defective, in disrepair, and/or in ruin at various times pertinent herein, which caused or contributed to plaintiffs' damages and injuries, thus making GC and GCC liable to plaintiffs and other persons and entities pursuant to Article 2322.

47.

Defendants GC, GCC, VC, CC, UT, ICR, KCSR, NWC, TRI, and TPRI, are strictly and/or absolutely liable to plaintiffs and all other persons and entities similarly situated, for all damages sustained as a result of the unauthorized leaks of toxic

and hazardous vapors, fumes, and chemical materials, inasmuch as same wrongfully entered onto the property of plaintiffs in violation of Article 667-669 of the Louisiana Civil Code. These defendants are liable jointly, severally, and in *solido*, for damages associated with the nuisance and/or trespass occurring as a result of the foregoing.

(E) ABSOLUTE LIABILITY

48.

At all times pertinent herein, defendants GC, GCC, VC, CC, UT, ICR, KCSR, NWC, TRI, and TPRI, engaged in ultrahazardous activity within the meaning of Louisiana law, to-wit: activity which can cause injury to others, such as the handling, transportation and/or storage of toxic gas, and in which the risk, even if reasonable, is high enough such that the activity may not be undertaken by these defendants without assuming responsibility for the consequences of any resulting harm to plaintiffs and those similarly situated.

49.

Plaintiffs and other persons and entities similarly situated suffered damages and injuries caused by defendants' ultrahazardous activities. Accordingly, each and all of these defendants is/are absolutely liable for these damages and injuries.

* * * *

Supreme Court, U.S.
FILED
NOV 2 1998
CLERK

No. 98-465

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,
v.
DARRELL DARDEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Twenty-Second Judicial District Court for the Parish of Washington, State of Louisiana

REPLY BRIEF FOR PETITIONER

JOHN G. ROBERTS, JR.*
GREGORY G. GARRE
CATHERINE E. STETSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5810

F. FRANK FONTENOT
JAMES K. IRVIN
TIMOTHY T. RONIGER
MILLING BENSON WOODWARD L.L.P.
909 Poydras Street
Suite 2300
New Orleans, LA 70112
(504) 569-7000

* Counsel of Record
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-465

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DARRELL DARDEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Twenty-Second Judicial District Court for the Parish of Washington, State of Louisiana

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REPLY BRIEF FOR PETITIONER

In their opposition brief, respondents attempt to answer KCS's argument in three ways. First, unable to justify the state court's decision in any other way, they create a new requirement for express pre-emption under the Federal Railroad Safety Act ("FRSA") out of whole cloth. Next, implicitly conceding that the state court was required to (but did not) make FRSA pre-emption determinations claim by claim, respondents argue that certain aspects of their individual claims justified the court's pre-emption ruling. And finally, lacking any support from this Court for their arguments, respondents instead rely upon two state appeals court cases which likewise flouted this Court's opinion in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993). Respondents' arguments should be rejected and the petition granted to resolve the important question presented.

1. Respondents argue that the trial court's decision, which rejected KCS's pre-emption argument based on unenumerated "things" in plaintiffs' complaint, actually comported with this Court's decision in *Easterwood*. To support their argument, however, respondents are forced to read into *Easterwood* an entirely new requirement for express FRSA pre-emption—a requirement not enumerated by this Court in *Easterwood*, nor by any court since.

The FRSA's express pre-emption clause provides that state laws, rules, regulations, orders, or standards relating to railroad safety may remain in place only "until the Secretary of Transportation prescribes a regulation or issues an order *covering the subject matter* of the State requirement." 49 U.S.C. § 20106 (emphasis added). Thus, as KCS pointed out in its opening brief, the pertinent question in FRSA pre-emption analysis is whether the Secretary of Transportation has issued regulations which cover the subject matter—that is, "substantially subsume"—Louisiana negligence law pertaining to railroad cars transporting hazardous materials. *See* Pet. 15; *Easterwood*, 507 U.S. at 664. And as KCS discussed at length in its opening brief, the extensive regulations issued by the Secretary under the FRSA and the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 *et seq.* ("HMTA"), substantially subsume each and every one of plaintiffs' specific claims against the railroad. *See* Pet. 15-18.

Respondents, however, argue that *Easterwood* demands more. In their opposition brief, respondents repeatedly claim that for the FRSA to pre-empt state law, not only must federal regulations "cover the subject matter" of the law; the state law must also "impede[] or frustrate[]" the federal provisions. Opp. 11; *see also id.* (plaintiffs' state law claims do not "frustrate * * * or conflict with" federal regulations); *id.* 12 (KCS "must show that the Louisiana tort law * * * would specifically operate to impede or impair a federal regulatory provision"); *id.* 15

(*Easterwood* reflects "purpose of pre-emption: to set aside state law which competes with and frustrates applicable federal law"); *id.* 18 (KCS must show Louisiana tort claim "conflicts with a federal regulation in an area or on a subject substantially subsumed by that federal regulation"). This misreading of *Easterwood* is most apparent on page 17 of respondents' brief. After advancing the settled propositions that express pre-emption is available only where Congress clearly intends, and that the FRSA pre-empts state law only where it "substantially subsumes" the subject matter of the state law in question, respondents suggest that "express preemption under the FRSA is *further* reserved for cases in which there is an attempt to apply state tort law in a way which frustrates, contradicts, or is in conflict with, federal law or regulatory interests." Opp. 17 (emphasis added).

Respondents err. This Court's *implied* pre-emption jurisprudence demands that a state law "actually conflict" with federal law before it is pre-empted. *See Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983); *see generally Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 516-517 (1992).[1] But where an *express* pre-emption provision exists, as it does in this case, the language of the statute itself "contains the best evidence of Congress' pre-emptive intent." *Easterwood*, 507 U.S. at 664. The FRSA's express pre-emption clause requires no showing that a state law conflict with, interfere with, impede, or frustrate federal law—only that federal law cover the subject matter of the state law in question.[2]

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[1] A federal statute may also impliedly pre-empt state law if the federal law so thoroughly occupies a legislative field "'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Fidelity Fed. Sav. & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

[2] Respondents' argument more properly is addressed to the FRSA's savings clause, which allows an "additional or more

What's more, the invocation of state tort law covering the same subject matter as a dense network of federal regulations, as in this case, *does* "impair" and "frustrate" Congress's purpose in enacting the FRSA. The federal government has long intended—for over a hundred years—that railroads and railroad safety be subject to uniform regulation. *See R.J. Corman R.R.* v. *Palmore*, 999 F.2d 149, 151-152 (6th Cir. 1993) (noting "Congress's general intent that railroads should be regulated primarily on a national level through an integrated network of federal law"). The express purpose of the FRSA, in fact, is to "promote safety in *every area* of railroad operations," 49 U.S.C. § 20101 (emphasis added), and the statute itself states that "[l]aws, regulations and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106; *see also Donelon* v. *New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir.) ("The ultimate goal of the Act is to establish nationally uniform control of railroad safety"), *cert. denied*, 414 U.S. 855 (1973).

The FRSA has prescribed and delimited the role of the States in regulating railroad safety. Where, as here, a network of railroad safety and hazardous-waste regulations blankets the subject matter of plaintiffs' tort claims, the tort claims must give way. *See* Pet. 4-7 & n.5 (discussing extensive federal railroad safety regulatory scheme); *id.* 17 (discussing implied pre-emption).

2. Pointing to various individual claims in their complaint, respondents next argue that the state court was correct to reject KCS's pre-emption defense across the board. Opp. 19-21. In arguing claim by claim, however, respondents implicitly concede that *Easterwood* required

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stringent" state railroad safety law to remain in effect if, among other things, the state law "*is not incompatible with a* [*federal*] *law, regulation, or order.*" 49 U.S.C. § 20106 (emphasis added). The savings clause is not at issue in this case. *See* Pet. 8-9 n.6; *Easterwood*, 507 U.S. at 675.

the trial court to make claim-by-claim pre-emption determinations. Instead, the court vaguely concluded that certain unenumerated "things" in plaintiffs' complaint were not subsumed by federal law—and that plaintiffs' complaint, *in its entirety*, therefore survived KCS's pre-emption challenge. To determine whether a complaint containing multiple claims is pre-empted under the FRSA, the trial court was required to examine *each* claim to determine whether federal regulations cover the subject matter of that claim. *Easterwood*, 507 U.S. at 665; *see also Cipollone*, 505 U.S. at 523-524 (Court's pre-emption analysis addressed "each category of damages actions in turn"); *Bryan* v. *Norfolk & W. Ry.*, 154 F.3d 899 (8th Cir. 1998) (analyzing each claim of negligence separately for FRSA pre-emption). Because plaintiffs' individual claims against KCS involved several different subject matters—namely, the transportation of hazardous materials, inspection of tank cars, hiring and training of hazardous materials employees, and proper public-sector notification and emergency procedures—*Easterwood* required the trial court to address and resolve KCS's pre-emption defense as to each claim.

3. Respondents repeatedly suggest that KCS may not assert a pre-emption defense against the "generally-pled allegations" in their complaint. *See, e.g.*, Opp. 19. General or not, respondents' allegations are what they are: each claim accuses KCS of violating its common law duties with respect to subject matters amply covered by federal regulations. Respondents should not be heard to suggest that other, unenumerated claims—claims not raised after multiple amendments of the complaint, no less—could withstand FRSA pre-emption, when the claims they now raise clearly cannot.

4. Finally, respondents look to two Louisiana appeals court cases to justify the decision below. Those cases prove only that Louisiana has ignored *Easterwood*'s dictates more than once, confirming the need for review by

this Court. *See* Pet. 19-20 (noting that "[t]his is not the first time the Louisiana courts have misapplied *Easterwood* * * * to foreclose a legitimate pre-emption defense"). In *Haydel* v. *Hercules Transport, Inc.*, 654 So.2d 418 (La. App.), *writ denied*, 656 So.2d 1019 (La. 1995), the court of appeals reviewed the pre-emption provisions of the HMTA in light of a state tort claim for punitive damages under Article 2315.3 of the Louisiana Code. Substantively different from those of the FRSA, the HMTA's pre-emption provisions provide that a state requirement is pre-empted by federal law if complying with the state requirement is "not possible," or if the state requirement poses an "obstacle" to the purposes of the HMTA. 49 U.S.C. § 5125. A state law "not substantively the same" as the federal statutes or regulations is also pre-empted under the HMTA if it addresses, *inter alia*, the classification, packing, and shipping of hazardous materials. *Id.* § 5125(b); *see also* Pet. 9 n.7 (discussing HMTA pre-emption provisions).

Concluding that the state damages statute provided a "remedy for individual persons" that the HMTA did not, the court of appeals held that the statute did not pose an obstacle to the HMTA's purposes and "address[ed] totally separate and distinct subject matters" than those enumerated in Section 5125(b). This holding directly contradicts *Easterwood*, where this Court—despite the lack of compensatory remedies in the federal statutory scheme—concluded that a state tort action was nonetheless pre-empted by the complex network of federal regulations covering the subject matter of the plaintiff's claims.

The Louisiana appeals court compounded its error in *In re New Orleans Train Car Leakage Fire Litig.*, 671 So.2d 540 (La. App.), *writ denied*, 675 So.2d 1120 (La.), *cert. denied*, 117 S. Ct. 512 (1996), an FRSA pre-emption case with the same state punitive damages statute at issue. Although *New Orleans Train Car* in-

volved FRSA rather than HMTA pre-emption, the court of appeals simply adopted the reasoning of the *Haydel* court, concluding that the FRSA's penalty provisions and the state damages statute had "different purposes." *See* 671 So.2d at 546. As KCS observed in its opening brief, this was clear error under *Easterwood*. *See* Pet. 20-21.[3]

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[3] Respondents also suggest, Opp. 4-7, that Article 965 of the Louisiana Code of Civil Procedure prevented KCS from moving for judgment on the pleadings, because KCS had filed an answer in which it denied the allegations in plaintiffs' complaint. Article 965 states that

> Any party may move for judgment on the pleadings after the answer is filed. * * * For the purposes of this motion, all allegations of fact in the *mover's* pleadings *not denied by the adverse party* or by effect of law, and all allegations of fact in the adverse party's pleadings shall be considered true.

Article 965 is modeled after Federal Rule of Civil Procedure 12(c), the rule governing motions for judgment on the pleadings in federal court. *See* Official Revision Comments to La. Code Civ. Proc. Ann. art. 965. Under Article 965, where a defendant has denied allegations in a complaint, a *plaintiff* moving for judgment on the pleadings may not assert those facts as true, because those facts are "denied by the adverse party." *Id.*; *see Abshire* v. *W.D.L. Invs., Inc.*, 428 So.2d 1145, 1147 (La. App.) (where defendant denied allegations in complaint, judgment rescinding sale to plaintiff improper), *writ denied*, 433 So.2d 161 (La. 1983); *Thomas* v. *Allstate Ins. Co.*, 367 So.2d 1300, 1302 (La. App. 1979) (where defendant denied allegations in complaint, plaintiff could not assert them as true in motion for judgment on the pleadings); *Alexander* v. *Bates*, 192 So.2d 186, 187 (La. App. 1966) (same); *Strange* v. *Carraway*, 105 So. 225 (La. 1925). Nor may a *defendant* moving for judgment on the pleadings assert as true facts contested by a plaintiff. What respondents suggest, however, is that a defendant's denial of facts in the complaint prevents that defendant from moving for judgment on the pleadings. Nothing in La. Code Art. 965—or in the federal rule upon which Article 965 is modeled—supports that reading. Not only is respondents' technical argument wrong: the trial court did not adopt it, instead reviewing on the merits KCS's motion for judgment on the pleadings before denying the motion.

For the foregoing reasons, and for those set forth in the petition, the petition should be granted.

Respectfully submitted,

JOHN G. ROBERTS, JR.*
GREGORY G. GARRE
CATHERINE E. STETSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5810

F. FRANK FONTENOT
JAMES K. IRVIN
TIMOTHY T. RONIGER
MILLING BENSON WOODWARD L.L.P.
909 Poydras Street
Suite 2300
New Orleans, LA 70112
(504) 569-7000

* Counsel of Record

Counsel for Petitioner